Supreme Court, U.S.
FILED

97 • 328 JUN 2 3 1997

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

NO.

TRUTH SEEKER COMPANY, INC. et al,

Petitioners,

-v. -

JOHN G. JACKSON, et al,

Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

PETITION FOR WRIT OF CERTIORARI

Roy R. Withers, Esq. State Bar # 120779
WITHERS & GOULDING
2251 San Diego Avenue, Suite B-251
San Diego, California 92110-2926
Telephone: (619) 295-1305
Facsimile: (619) 297-9036

83 pp

QUESTIONS PRESENTED

I. Does the District Court, in determining sua sponte whether summary judgment should be granted, have the power, pursuant to Rule 56 of the Federal Rules of Civil Procedure, to increase the evidentiary requirements on the issue of damages existing from long standing case decisions?

II. As Reasonable Attorney Fees Are Capable Of Being Assessed By A Trial Judge Without The Introduction Of Any Evidence, The Granting Of The Summary Judgment On This Issue Is Clear Error.

III. Did the District Court err in failing to find Plaintiffs suffered nominal damages due to the actual injuries and damages which were incurred by Plaintiffs?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Appellant TRUTH SEEKER COMPANY, INC. is a New York corporation with its principal place of business in San Diego, California.

TRUTH SEEKER COMPANY, INC. has no parent companies, subsidiaries or affiliates. TRUTH SEEKER COMPANY, INC. does not issue shares of stock to the public.

PARTIES

Plaintiff/Appellant Truth Seeker Company, Inc. is a New York corporation with its principal place of business in San Diego, California.

Plaintiff/Appellant Lawrence Y. True, deceased, was Trustee of the James Hervey Johnson Charitable Educational Trust and the Truth Seeker Trust, which were created under California law in San Diego, California from the estate of James Hervey Johnson, deceased, and was at all times relevant herein a citizen of the State of California.

Defendant/Appellee Madalyn E. Murray O'Hair, an individual, was at all times relevant herein a citizen of the State of Texas.[1]

Defendant/Appellee John G. Jackson, deceased, an individual was at all times relevant herein a citizen of the State of Illinois.

Defendant/Appellee John W. Vinson an individual, was at all times relevant herein a citizen of the State of Texas.

Defendant/Appellee American Atheist General Headquarters (hereinafter, "AAGHQ") is a Texas corporation with its principal place of business at 7215 Cameron Road, Austin, Texas.

Defendant/Appellee Society of Separationists (hereinafter, "SOS") is a Maryland corporation with its principal place of business at 7215 Cameron Road, Austin, Texas.

Defendant/Appellee American Atheists, Inc. (hereinafter, "AAI") is a Texas corporation with its principal place of business at 7215 Cameron Road, Austin, Texas.

---

[1] On March 21, 1997, Madalyn Murray O'Hair, though an appointed receiver, filed a Chapter 7 Petition for bankruptcy in the _ Western District of Texas. The U.S. District Court, Ninth Circuit, on June 3, 1997 acknowledged the automatic stay which was in effect pursuant to 11 U.S.C. §362(c) and confirmed that all matters against Madalyn Murray O'Hair were stayed. Hence, this Petition does not pertain to Madalyn Murray O'Hair.

Defendant/Appellee Charles E. Stevens American Atheist Library and Archives, Inc. (hereinafter, "CESAALA") is a Texas corporation with its principal place of business at 7215 Cameron Road, Austin, Texas.

Defendant/Appellee American Atheist Press, Inc. (hereinafter, "AAP") is a Texas corporation with its principal place of business at 7215 Cameron Road, Austin, Texas.

Defendant/Appellee United World Atheists, Inc. is a Texas corporation with its principal place of business at 7215 Cameron Road, Austin, Texas.

The above-referenced Corporate Defendants are hereinafter referred to collectively as "Corporate Defendants."

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF CASE 3

I. Procedural History of the Substantive Claims of the Parties 8

II. The Rulings Below 11

REASONS FOR GRANTING THE WRIT 12

I. The Ruling Of The Appellate Court Is In Direct Conflict With A Long Line Of Decisions Pertaining To The Issue Of Proof Required On Claimed Damages 12

II. The Use of FRCP Rule 56 To Assess The Reasonableness Of Damages In A Malicious Prosecution Action Is Not Proper 18

III. Summary Judgment Was Improper Because Even If The Extent And Nature Of The Attorneys' Fees Incurred By Plaintiffs Is Unascertainable Due To Insufficient

Evidence, Nominal Damages Should Have Been Awarded To Plaintiffs By The District Court 25
CONCLUSION 27

APPENDICES

Appendix A: Memorandum of the United States Court of Appeals for the Ninth Circuit..... 1a
Appendix B: Order of the United States Court of Appeals for the Ninth Circuit..... 9a
Appendix C: Order of the United States Court of Appeals for the NinthCircuit..... 14a
Appendix D: Opinion of the United States District Court for the Southern District Of California..... 16a
Appendix E: United States District Court Judgment in a Civil Case..... 34a
Appendix F: Supreme Court Rule 29.6 (1997)..... 36a
Appendix G: 28 United States Code Section 1254 (1).... 37a
Appendix H: 11 United States Code Section 362..... 38a
Appendix I: California Code of Civil Procedure Section 1032..... 41a
Appendix J: California Civil Code Section 3360..... 43a
Appendix K: Federal Rules of Civil Procedure, Rule 56(c)..... 44a

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES:

Abington Township v. Schempp,
374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed. 2d 844 (1963) 3

Anderson v. Liberty Lobby, Inc.
477 U.S. 242, 106 S.Ct. 2505, 2510 (1986) 18

Celotex Corp. v. Catrett,
477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed. 265 (1986) 19

FEDERAL CASES:

Bank of California v. Opie,
633 F. 2d 977, 980 (9th Cir. 1981) 18

Farmland Industries, Inc. v. Grain Board of Iraq,
904 F. 2d 732, 736, fn. 7 (DC Cir. 1990) 18

Hancock Laboratories, Inc. v. Admiral Ins. Co.,
777 F. 2d 520, 525, 527 fn.12 (9th Cir. 1985) 20

Jackson et. al. v. The Truth Seeker Company, Inc.
884 F. Supp. 370 (S.D. Cal. 1986) 1

Von Brimer v. Whirlpool,
536 F. 2d 838, 847, (9th Cir. 1976) 13

CALIFORNIA STATE CASES:

Avina v. Spurloch,
28 Cal. App. 3d 1086, 1088, 105 Cal. Rptr. 198 (1992) 26

Albertsworth v. Glen Falls Indem. Co.,
84 Cal. App. 2d 816, 825, 192 P. 2d 66, 72 (1948)..... 22

Bertero v. National General Corp.,
13 Cal. 3d 43, 65-67, 118 Cal. Rptr. 184 (1974) 13, 26

Bowman v. Maryland Casualty Co.,
100 Cal. App. 658, 667, 280 P. 1008 (1928) 20

Clejan v. Reisman,
5 Cal. App. 3d 224, 84 Cal. Rptr. 897, 908 (1970) 20

Estate of Dufill,
188 Cal. 536, 552, 206 P. 42 (1922) 20

Estate of Iser,
52 Cal. 405, 408, 198 P. 1014 (1921) 20

Gray v. Craig,
127 Cal. App. 374, 378, 15 P. 2d 762, 793 (1932) 26

Grecian v. Jackson,
76 Cal. App. 264, 244 P. 608 (1926) 20

Kirk v. Culley,
202 Cal. 501, 505, 261 P. 994 (1927) 20

Mills v. Friedman,
119 Cal. App. 74, 81, 5 P.2d 901 (1931) 19

Pehau v. Stewart,
112 Cal. App. 2d 90, 245 P. 2d 692, 697 (1952) 20

Scott, Black & Wynne v. Summitt Ridge Estates, Inc.,
251 Cal. App. 2d 347, 358, 59 Cal. Rptr. 587, 594 (1967) 20, 21

Spenser v. Collins,
156 Cal. 298, 306-307, 104 P. 320 [20 Ann. Cas. 49] (1909) 20

Stevens v. Chisholm,
179 Cal. 557, 564, 178 P. 128 (1919) 14, 17

Sterling Drug, Inc. v. Benatar,
99 Cal. App. 2d 393, 400, 221 P. 2d 965 (1950) 26

Sweet v. Johnson,
169 Cal. App. 2d 630, 633, 337 P. 2d 499 (1959) 26

Theisen v. Keough,
115 Cal. App. 353, 1Pd 1015 (1931) 20

SUPREME COURT RULES:

Supreme Court Rules, Rule 29.6..... ii

UNITED STATES CODES AND STATUTES:

11 United States Code § 362(c) ii

28 United States Code § 1254(1) 2

FEDERAL RULES AND STATUTES:

Federal Rules of Civil Procedure, Rule 56 (c)..... 2,8,18,19

CALIFORNIA STATE STATUTES:

California Code of Civil Procedure § 1032 (4)(b) 26

California Code of Civil Procedure § 3360 25

TREATISES, JOURNALS AND PUBLICATIONS:

Schwarzer, Summary Judgment Under the Federal Rules:
Defining Genuine Issues of Material Fact 19
99 FRD 465, 466 (1984)

PETITION FOR A WRIT OF CERTIORARI

Petitioners the Truth Seeker Company, Inc. and Lawrence Y. True, Trustee of the James Hervey Johnson Charitable Educational Trust and the Truth Seeker Trust, seek a writ of certiorari to review an opinion and order of the United States Court of Appeals for the Ninth Circuit, which affirmed an order granted by the United States District Court for the Southern District of California dismissing Petitioners' claims by summary judgment.

OPINIONS BELOW

The December 31, 1996 opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, has not been published for decision and is set forth in the separate Appendix to this Petition, pp. 1a-7a. The Order of the Court of Appeals denying Appellants' Petition for Rehearing is reprinted in the separate Appendix to this Petition at p. 13a The prior opinion by the Hon. Manuel L. Real, Judge, of the United States District Court for the Southern District of California in the case of Jackson v. Truth Seeker Company, Inc. at 884 F. Supp. 370. (S.D. Cal. 1994), is also reprinted in the Appendix to this Petition at pp. 14a-23a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered December 31, 1996. On January 13, 1997 the Court of Appeals granted Plaintiffs an extension of time until January 21, to file a Petition for Rehearing. Plaintiffs filed a Petition for Rehearing on January 21, 1997. The Court of Appeals denied Plaintiffs' Petition for Rehearing on March 24, 1997. The jurisdiction of this Court is invoked pursuant to 28 USC § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of Federal Rule of Civil Procedure, Rule 56(c) ("FRCP Rule 56") which states in pertinent part:

> "...The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

STATEMENT OF THE CASE

This matter originated when the self-proclaimed premier atheist in the world, Madalyn Murray O'Hair,[2] ("O'Hair") utilized her non-profit atheist organizations located in Austin, Texas to orchestrate a scheme to obtain millions of dollars from an individual by the name of James H. Johnson, deceased, ("Johnson").[3]

Johnson, a resident of San Diego, had been publishing, since 1964, a continuing freethought magazine which promoted non-dogmatic thinking. This magazine was known as the Truth Seeker. The Truth Seeker is still published and is the oldest freethought publication in the world, having been printed continually since 1873.

Johnson advanced this publication through a corporation known as the Truth Seeker Company, Inc. The Truth Seeker Company was incorporated in New York in 1940. Johnson used his own efforts and money to publish The Truth Seeker.

---

[2] Madalyn Murray O'Hair gained her fame and notoriety as a result of her participation in the case of Abington Township v. Schempp 374 US 203, 83 Ct. 1560, 10 L.Ed. 2d 844 (1963). Abington involved a separation of church and state issue pertaining to the removal of prayer from public schools. Based upon this recognition, Madalyn Murray O'Hair was able to obtain fame and ultimately fortune from donations for her alleged cause to advance atheism. Over the years O'Hair's popularity waned and her ability to obtain funding for her own personal use became increasingly difficult.

[3] The Use of O'Hairs' name only in this statement refers to all named parties as they all acted in concert. O'Hair, and her children, controlled all of the corporate defendants and as an act of O'Hair is and act of the defendant corporations.

O'Hair, knowledgeable of Johnson's publication, subscription list, and his personal fortune of over sixteen million dollars ($16,000,000.00), sought to join forces with Johnson as early as 1981. Johnson rebuked all of O'Hair's offers. O'Hair became angry and determined. O'Hair saw Johnson as a means of replenishing her empire which was slowly dying.

O'Hair placed in motion a plan to swindle Johnson's money for her own personal aspirations and needs. O'Hair serendipitously investigated Johnson in early 1987. O'Hair had individuals offer their services to Johnson to assist him in the publication of The Truth Seeker with their real purpose being one of acquisition of information on Johnson's health, his money, his magazine, subscription list and estate plan, with as much documentary support as possible. All information obtained was funneled to O'Hair in Austin Texas. O'Hair, having confirmed Johnson's wealth and his ailing health, which left Johnson quite frail, fraudulently induced John G. Jackson, ("Jackson"), a resident of Chicago, Illinois, to be the "strawman" on a complaint to be filed in the Federal Court in the Southern District of California. This was just one of the vehicles used by O'Hair in an attempt to obtain Johnson's money.[4] The

---

[4] O'Hair attempted to have a conservatorship imposed over Johnson's estate, not over Johnson personally, just his money. O'Hair held a bogus shareholder meeting wherein she was elected President of the Truth Seeker Corporation. O'Hair then used this alleged position in an attempt to secure the corporation's

complaint was a corporate derivative action which sought an accounting and return of the $16,000,000.00 alleged to have been misappropriated by Johnson. While Jackson was the named Plaintiff, O'Hair was the active and controlling principal of this litigation. O'Hair, with her non-profit corporations donated proceeds, funded all aspects of the litigation against Johnson. O'Hair was the boss, Jackson did what he was told. Jackson was represented by O'Hair's corporate counsel and by her selected and paid private attorneys, which she controlled.

The Jackson litigation was commenced in 1987 and was dismissed by way of summary judgment in 1990. This was a period of 2½ years of federal litigation. The basis for granting the summary judgment was due to O'Hair's inability to demonstrate Jackson's shareholder status, which is the basis of a corporate derivative action. This claim was made from the outset by Plaintiffs but could not be legally established, despite several attempts, until after significant discovery and motions had been completed. This cost Johnson and his Trust hundreds of thousands of dollars on a complaint which had no merit from its inception.

---

assets into her possession. O'Hair commenced issuance of her own Truth Seeker publication from Austin, Texas and solicited donations under this stolen mast head. O'Hair also challenged Johnson's probated estate distribution plan by claiming she was the most desired and able individual to receive Johnson's assets so she could continue the cause of atheism. O'Hair was sanctioned by various courts on numerous occasions because of her improper conduct.

Several of O'Hair's inside people, who had been duped and used by O'Hair to advance this litigation, turned on O'Hair. Information regarding O'Hair's true motive and the extent of her actions were disclosed to Plaintiffs. The acts of O'Hair and her supporters clearly established the malicious and vindictive motive of O'Hair to obtain Johnson's money through this unsupported and manufactured litigation. As a result of this information Plaintiffs filed the instant malicious prosecution action against O'Hair, her corporations, and her in house corporate counsel in order to recover the attorney fees which were expended in defending against the malicious action of O'Hair.

Prior to trial on the malicious prosecution action, two of the four necessary elements were established in Plaintiffs' favor. The District Court had ruled that the corporate derivative complaint had been initiated by O'Hair and her organizations and had terminated in Johnson's favor. The District Court also found that O'Hair had commenced and maintained the corporate derivative complaint without probable cause. The only issues remaining for resolution were malice and damages, clearly triable issues.

A jury trial was held on November 2, 1993 and was declared a mistrial in December of 1993 due to a deadlocked jury.

At the commencement of the second scheduled and ordered jury trial, based upon a disguised motion-in-limine, the District Court unexpectedly struck the jury and ordered the matter tried before the court, with the court sitting as the trier of fact.

The District Court struck the jury on the basis that the requirements of the Seventh Amendment had not been met. The court reasoned that the damages sought in the malicious prosecution action were not cognizable damages at common law and therefore did not support the Seventh amendment requirement for damages in excess of $20.00.

The Ninth Circuit Court of Appeals corrected this erroneous ruling and found that a jury trial should have been provided as the damages were proper and the Seventh Amendment satisfied. However, the Appellate Court found that there was no harm in denying Plaintiffs their constitutionally guaranteed jury trial as the issue of damages, on the malicious prosecution action, had been properly summarily adjudicated by the District Court. The Appellate Court agreed with the District Court that no evidence was submitted at trial to show that the damages incurred and claimed by Plaintiffs were reasonable. Adopting an all or nothing approach, the District Court's

ruling was affirmed by the Appellate Court and O'Hair was allowed to escape from the consequences of her actions despite having clearly violated the law by commencing a malicious and unfounded lawsuit which Johnson was forced to defend in a Federal District Court for over two (2) years.

The ruling of the appellate court completely emasculates a long standing body of law, which provides direction on the issue of damages and the requirements necessary to avoid a summary judgment determination pursuant to FRCP Rule 56. The Appellate Court ruling should be reversed to avoid future misdirection and to provide a clear and concise statement that the manner of establishing damages, sufficient to avoid a summary judgment ruling, has been formally and firmly established and will not be altered.

I. Procedural History of the Substantive Claims of the Parties

On October 5, 1987, John G. Jackson (hereinafter, "Jackson") filed a corporate derivative complaint for an accounting from Johnson and seeking the return of funds allegedly misappropriated from the Truth Seeker Company, Inc. by Johnson. The lawsuit was filed in the United States District Court for the Southern District of California. Federal jurisdiction was based upon diversity of citizenship. Jackson was the named Plaintiff in this action, entitled Jackson, et al. v. The Truth Seeker Company, Inc., et al.,

Civil Case no. 87-1441-K (hereinafter, "Jackson Action"). On November 30, 1987, an answer to the complaint was filed by all named Defendants.

Johnson died on August 6, 1988 and his estate was substituted for him on January 17, 1989. Lawrence Y. True, executor of Johnson's estate and trustee of two (2) trusts created from Johnson's estate, continued the defense of the Jackson Action.

On January 8, 1990, the District Court, the Hon. Judith N. Keep, Judge, presiding, ruled on, a summary judgment motion, that Jackson could not establish shareholder status in the Truth Seeker Company, Inc. The Court summarily adjudicated the Jackson Action and also granted a motion to dismiss, brought by Defendants, on all causes of action in Jackson's complaint.

On April 11, 1991, a malicious prosecution complaint was filed entitled Lawrence Y. True, et al. v. John G. Jackson, et al., Civil case no. 91-0494-K (hereinafter, the "True Action). On April 29, 1991, an Answer was filed by all named Defendants except for John Vinson and John G. Jackson. Vinson's answer was filed on June 28, 1991 and Jackson's answer was filed on May 29, 1992.

On October 26, 1992, the District Court, on the True Action, by way of summary judgment, held that the termination of the Jackson Action was in favor of Plaintiffs and was a final decision on the merits.

On February 16, 1993, the District Court, on the True Action, by way of summary judgment, held that the underlying Jackson Action was brought without probable cause.

On November 2, 1993, the True Action was heard by way of a jury trial in the District Court before the Honorable Judith Keep; judge presiding.

On December 2, 1993, the District Court declared a mistrial due to a deadlocked jury.

On the morning of the commencement of the scheduled and ordered jury trial the District Court the Honorable Manuel L. Real, judge presiding, struck the jury on the malicious prosecution action on the basis that $20.00 in damages, required by the Seventh Amendment had not been satisfied.

A bench trial was subsequently held on March 28, 1994 in the District Court, the Hon. Manuel L. Real, judge, presiding. On November 23, 1994, the District Court entered judgment in favor of Defendants. [Appendix D]

Plaintiffs appealed the judgment of the District Court to the Court of Appeals. Plaintiffs' Appeal was denied on December 31, 1996 [Appendix A] and Plaintiffs' Petition for Rehearing was denied on March 24, 1997. [Appendix C]

II. The Rulings Below

The rulings of the lower court which are the subject of this Petition pertain to the issue of damages on the malicious prosecution action.

The Appellate Court issued a judgment affirming the District Court's ruling that Plaintiffs failed to submit evidence at trial on the reasonableness of damages incurred on the defense of the malicious prosecution action. As a result, the summary judgment by the District Court was found to be proper and the ruling affirmed by the Appellate Court.

The Court of Appeals ruled that "because the plaintiffs presented no evidence of the reasonableness of the attorneys' fees claimed as damages, we hold that the District Court properly granted summary judgment in favor of the defendants." [Appendix A; emphasis in original].

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I.

The Ruling Of The Appellate Court Is In Direct Conflict With A Long Line Of Decisions Pertaining To The Issue Of Proof Required On Claimed Damages When Defending Against A Summary Judgment Determination

Based upon the reasoning and ruling of the Appellate Court, in order for Plaintiffs to avoid a summary judgment ruling, on the issue of damages, Plaintiffs needed to demonstrate that the damages incurred on the malicious prosecution action were reasonable. This showing was found by the Appellate Court to include more than is required under current legal authority on an evidentiary showing to defend against a summary judgment ruling. The Appellate Court's ruling, if allowed to stand, establishes an all or nothing approach where the reasonableness of Plaintiffs' damages is alleged not to have been shown. In other words, if all of the damages claimed are not shown to be reasonable, no assessment is then made as to what portion of the claimed damages, if any, are reasonable. The claim is simply denied in full based upon

the current ruling of the Appellate Court. This clearly is not the law of the State of California nor of the United States Government and is in direct conflict with existing legal decisions.

As the Court of Appeals correctly observed, the settled law of the State of California recognizes attorneys' fees incurred in the defense of a malicious action as damages in a subsequent malicious prosecution action. Bertero v. National General Corp., 118 Cal.3d 43, 65-67, 118 Cal. Rptr. 184 (1974). The federal courts have long recognized California decisional law regarding the availability of attorneys' fees as malicious prosecution damages; see Von Brimer v. Whirlpool, 536 F.2d 838, 847 (9th Cir. 1976), where the Court of Appeals observed that sums expended in defending an unfounded lawsuit are cognizable as damages. Based on these authorities, the Court of Appeals correctly found that the District Court had improperly denied Plaintiffs a jury trial on the malicious prosecution action.

Despite this ruling, the Court of Appeals held that because Plaintiffs "presented no evidence of the reasonableness of the attorneys' fees claimed as damages ... the District Court properly granted summary judgment in favor of the defendants;" [Appendix A. pg. 7a (emphasis in original)]. Here is where the Court of Appeals' decision

conflicts with long-standing rulings of the California Supreme Court.

The Court of Appeals has put an additional qualifier on the proof required on a Rule 56 motion, and at trial, when assessing the element of damages. The Court of Appeals held that it is not enough to survive a Rule 56 motion to show that damages were incurred and paid. The malicious prosecution plaintiff must now show that the damages incurred and paid were *reasonable*, whether or not the amount of damages claimed is ever challenged by the opposition. This clearly is not the law and conflicts with long standing legal authority.

Plaintiffs made a prima facie demonstration on the reasonableness of attorneys' fees which were claimed as damages pursuant to established and controlling law. The California Supreme Court established a standard for proof of damages that has not been challenged since 1919. In Stevens v. Chisholm, 179 Cal. 557, 564, 178 P. 128 (1919), the California Supreme Court held that testimony that attorney fees were incurred and paid is evidence constituting a *prima facie* case and it will be presumed that the attorneys' fees paid were reasonable. To defeat this prima facie showing, Stevens requires a showing that the attorneys' fees that were incurred and paid by Plaintiff were "obviously excessive", id. at p. 564.

There was nothing before either the District Court or the Court of Appeals that "obviously" showed that the fees incurred in the defense of the Jackson Action were "excessive." Defendants introduced nothing at trial to demonstrate that the attorneys' fees paid by Plaintiffs were excessive, having rested after presentation of Plaintiffs' case-in-chief.

During trial, Plaintiffs' counsel attempted to introduce evidence on the issue of reasonableness. The District Court advised Plaintiffs' counsel that the issue of reasonableness of attorneys' fees was not relevant until Defendants challenged them. This statement by the District Court which followed the well established law, occurred during the examination of the Defendant, Madalyn Murray O'Hair, by Plaintiffs' counsel. The questioning and statement of the court occurred as follows:

Q:	OKAY. MA'AM, DO YOU RECALL THE FIRST DEPOSITION THAT I TOOK OF YOU IN 1988, I BELIEVE IT WAS, OR 1989?
MR. SCHUTZMAN:	I OBJECT ON THE GROUNDS OF RELEVANCE.
THE COURT:	THE OBJECTION IS SUSTAINED.

MR. WITHERS: YOUR HONOR –

THE COURT: WHAT?

MR. WITHERS: THE DEFENSE RAISED BY THE DEFENDANTS HERE IS THAT AN OVER-INORDINATE AMOUNT OF ATTORNEYS' FEES WERE INCURRED BY PLAINTIFFS IN THIS ACTION. TO SHOW THAT THOSE FEES WERE NOT INORDINATE, I WOULD LIKE THE OPPORTUNITY TO SHOW HOW THE CONDUCT OF THESE DEFENDANTS –

THE COURT: NO. YOU TELL ME WHAT THE ATTORNEYS' FEES ARE AND THEY WILL THEN ANSWER IT, YES OR NO, ON BIG OR LITTLE. UP UNTIL NOW, THERE HAS BEEN NO ATTACK ON IT.

[RT Volume II at 190, Lines 1-15]

The Ruling of the District Court, on this objection, indicates that the District Court only wanted Plaintiffs to provide the Court with the total attorneys' fees incurred and

paid by Plaintiffs. Any evidence from Plaintiffs, on the issue of reasonableness, would not be entertained by the District Court, as such evidence was deemed irrelevant until the damages were challenged by the Defendants. **This challenge never occurred.** Defendants rested after Plaintiffs concluded their case-in-chief.

Based upon the well-settled principle set forth by the California Supreme Court in Stevens, 197 Cal. at 564, the testimony of Mr. True at trial, that $382,683.50 was incurred in the defense of the malicious action brought by Defendants, and subsequently paid, established a *prima facie* showing of damages. As the reasonableness of these fees was never challenged by the Defendants, there can be no finding by the District Court, or by the Court of Appeals, that these fees were "obviously excessive." Even if it were argued that the fees were obviously excessive, the argument assumes that there is an amount which is not excessive. The question and material trial issue would be what is the reasonable value for the services rendered by the attorneys in the defense of the malicious action. The granting of the summary judgment on the malicious prosecution action was clear error and should be reversed. This decision establishes significant and incorrect legal precedent which will cause confusion and improper results if it is attempted to be followed by other litigants and courts.

II.

The Use of FRCP Rule 56 To Assess The Reasonableness Of Damages In A Malicious Prosecution Action Is Not Proper

The interpretation and application of Rule 56 is a matter of federal law. Although the characterization of issues and the determination of materiality and of the sufficiency of the factual showing are often intertwined with questions of state law, whether a trial is necessary is a matter of federal law; Farmland Industries, Inc. v. Grain Board of Iraq, 904 F.2d 732, 736, fn. 7 (DC Cir. 1990).

In diversity actions, the state law creating the right sued upon governs issues such as, *inter alia*, the elements of the action, measure of damages, and applicable defenses; Bank of California v. Opie, 633 F.2d 977, 980 (9th Cir. 1981). The Rule 56 requirement that no "material" fact be in dispute is determined by applicable substantive law. As this Court stated in Anderson v. Liberty Lobby, Inc., 477 US 242, 106 S.Ct. 2505, 2510 (1986). "(i)t is the substantive law's identification of what facts are critical and what facts are irrelevant that governs." If the case goes to trial, the burden of proof in diversity actions is usually a substantive issue, governed by state law. But the burden of proof on a motion for summary judgment is governed by federal standards; Anderson v. Liberty Lobby, 477 US at 248-250.

The basic standard for granting summary judgment is that the court must find there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. (FRCP 56(c)).

The critical issues in ruling on a motion for summary judgment are:

(1) Does the dispute involve an issue of "fact"?

(2) Is the fact "material"?

(3) Is the dispute "genuine"?

In applying these standards, the trial courts attempt to serve the aims of properly disposing of cases in which there is no genuine issue as to any material fact, while protecting parties' right to trial when there are such disputed facts; see Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact,* 99 FRD 465, 466 (1984).

Rule 56 must be construed "with due regard ... for the rights of persons asserting claims and defenses tried to a jury ...", Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91L.Ed. 265 (1986). Summary judgment is a drastic remedy and is therefore to be granted cautiously.

Mills v. Friedman, 119 Cal. App. 74, 81, 5 P2d 901 (1931), involved a malicious prosecution action which resulted in an award of damages to Plaintiff. These damages represented attorneys' fees which had been incurred by Plaintiff for his defense of the criminal charges

brought against him by the Defendant. Defendant challenged on appeal the trial court's award of damages to Plaintiff, claiming that no evidence of reasonableness of the claimed attorney fees had been introduced at trial. The Appellate Court, in its decision, reiterated the long standing rule that where an issue of reasonableness of attorneys' fees arises, especially where the case is tried before the court sitting without a jury, no evidence of reasonableness is necessary [id. at p. 81]. The Appellate Court cites a string of California court decisions supporting this holding.[4]

The Ninth Circuit, in Hancock Laboratories, Inc. v. Admiral Ins. Co., 777 F. 2d 520, 525, 527 fn12, (9th Cir. 1985) [citing Clejan v. Reisman, (1970) 5 Cal. App. 3d 224, 84 Cal. Rptr. 897, 908; Pehau v. Stewart, (1952) 112 Cal. App. 2d 90, 245 P. 2d 692, 697] has recognized that the trier of fact in California may determine what is a reasonable amount to be allowed as attorneys' fees without hearing any testimony and without making any specific findings. Additionally, the Ninth Circuit, as set forth in Hancock, acknowledges that judges may rely on their own knowledge and experience to know reasonable attorneys' fees [citing Scott, Black &

---

[4] Spencer v. Collins, 156 Cal. 298, 306-307, 104 P. 320 [20 Ann. Cas. 49]; Estate of Dufill, 188 Cal. 536, 552, 206 P. 42; Kirk v. Culley, 202 Cal. 501, 505, 261 P. 994; Estate of Iser, 52 Cal. App. 405, 408, 198 P. 1014; Grecian v. Jackson, 76 Cal. App. 264, 244 P. 608; Bowman v. Maryland Casualty Co., 100 Cal. App. 658, 667, 280 P. 1008; Theisen v. Keough, 115 Cal. app. 353, 1 P2d 1015.

Wynne v. Summitt Ridge Estates, Inc., 251 Cal. App. 2d 347, 358, 59 Cal. Rptr. 587, 594 (1967)].

The Appellate Court's decision to grant summary judgment on the basis of Defendants failure to demonstrate reasonableness of the attorneys' fees contradicts this well-established legal principle that judges are capable of assessing reasonable attorneys' fee issues as a result of their knowledge and experience without any showing of reasonableness.

The policy behind this legal authority is clearly the result of the courts' active involvement in litigation and working knowledge of the legal profession, including required work, approximate time to conduct litigation tasks, and the reasonable hourly rate in the community. The court is capable of assessing reasonableness on its own, without assistance from counsel.

The rule in California is clear:

> It is well settled that when a judge is informed of the extent and nature of legal services, he can determine what is a reasonable fee from his own knowledge and experience without the necessity of other evidence. Scott, Blake & Wynne v. Summit Ridge Estates, Inc. 251 Cal. App. 2d 347, 358, 59 Cal. Rptr. 587, 594 (1967); see also

Albertsworth v. Glen Falls Indem. Co. 84 Cal. App. 2d 816, 825, 192 P. 2d 66, 72 (1948).

Even assuming, *arguendo*, that Plaintiffs presented no evidence on the issue of reasonableness of the attorneys' fees, the District Court, who was the trier of fact sitting without a jury, was fully aware of the extent and nature of the matter before it. The District Court was aware:

1. That the underlying malicious complaint, which had been initiated and maintained by Defendants against Plaintiffs, was a corporate derivative action which requested and accounting and return of alleged misappropriated funds of well over sixteen million dollars ($16,000,000.00);
2. That the original complaint of Defendants had been filed on October 5, 1987 and that this matter was litigated by way of discovery and motions for a period of twenty-eight (28) months until it was dismissed by way of successful summary judgment motion brought by Plaintiffs and granted on January 8, 1990;
3. That the litigation between the parties was hostile;

4. That the size of the court's own files on this matter was quite large, indicating significant legal work and court activity by all parties; and,

5. That Plaintiffs fought a two-year, four month corporate derivative action which ultimately resulted in the dismissal of the entire action and which was later found by way of summary judgment to have been brought without probable cause.

The extent and nature of the malicious prosecution action, which was defended against by Plaintiffs, clearly shows that necessary legal services were provided. Plaintiffs had been sued for $16,000,000.00 and their only recourse was to hire legal counsel. Simply to dispose of Plaintiffs' right to a jury trial and right to recover damages caused by Defendants' malicious conduct on the basis that the total sums paid by Plaintiffs for attorneys' fees was excessive begs the question: What sum was reasonable?

Clearly, if the sum paid by Plaintiffs was excessive, there is a sum which could have been determined by the District Court to be reasonable. The time involved in preparation of the answer to the malicious action alone would warrant an award of at least nominal damages. This should have been the subject of a factual determination by a

jury and not a summary judgment ruling by the District Court.

By analogy, if a Plaintiff, as a result of a Defendant's wrongful action, had lost his foot and at trial requested damages of two billion dollars, clearly, despite the existence of medical bills, pain and suffering, lost wages, etc... this claim would be unreasonable. Should a court be allowed to summarily adjudicate the Plaintiffs' claim because Plaintiff overstated his damages and sought more than was objectively reasonable? Clearly not. Instead, the trier of fact must determine what is a reasonable figure for the harm suffered by Plaintiff. This would be more than nothing. The same analogy applies to several other scenarios and should apply here.

The District Court, an experienced and qualified federal judge, could have easily determined an amount for attorneys' fees which was reasonable if he was of the opinion that the claimed fees were unreasonable. Plaintiffs should not have been denied a jury trial and the opportunity to receive rightful damages from Defendants when it is clear that real harm and damages were incurred.

III.

Summary Judgment Was Improper Even If The Extent And Nature Of The Attorneys' Fees Incurred By Plaintiffs Is Unascertainable Due To Insufficient Evidence, As Nominal Damages Should Have Been Awarded To Plaintiffs By The District Court As Plaintiffs Suffered Actual Injuries And Damages.

California Code of Civil Procedure Section 3360 recognizes an award of nominal damages. This section states:

> When a breach of duty has caused no appreciable detriment to the party affected, he may yet recover nominal damages.

Nominal damages can properly be awarded in two (2) circumstances:

1. When there has been no actual loss or injury to be compensated but the law recognizes a technical invasion of Plaintiff's rights or a breach of duty by a Defendant; or

2. Although there has been real, actual injury and damages by a Plaintiff, the extent of Plaintiff's injury and damages cannot be determined from the evidence presented.

Avina v. Spurloch, 28 Cal.App.3d 1086, 1088, 105 Cal.Rptr. 198 (1972); Sterling Drug, Inc. v. Benatar, 99 Cal.App.2d 393, 400, 221 P.2d 965 (1950); Gray v. Craig, 127 Cal.App. 374, 378, 15 P.2d 762 793 (1932).

If Plaintiffs introduced no evidence on the reasonableness of attorneys' fees, an award of nominal damages is the proper result. Clearly, real and actual damages had been suffered by Plaintiffs. An award of nominal damages would have been proper, given the clear showing of damages to Plaintiffs as this finding would have entitled Plaintiffs to a request for punitive damages and for costs associated with litigation.[6] In a malicious prosecution action, punitive damages are available; see Bertero v. National General Corp., 13 Cal.3d at 65-67.

Costs are recoverable as a matter of right to the prevailing party in a civil action; see California Code of Civil Procedure Section 1032(4)(b). It has been held that if a judgment awarding nominal damages would entitle the prevailing party to an award of costs, the failure to award nominal damages can constitute reversible error; Sweet v. Johnson, 169 Cal.App.2d 630, 633, 337 P.2d 499 (1959).

---

[6] The issue of punitive damages had been bifurcated from the trial by the District Court as set forth in the pre-trial order.

CONCLUSION

As nominal damages were available summary judgment on the issue of damages was improper. The issue should have gone to the jury.

The Court of Appeals' upholding of the summary judgment of the malicious prosecution action must be reversed and the case must be remanded to the District Court for trial by jury.

As stated above, summary judgment is a drastic remedy that must be applied cautiously. The concern for the interests of justice is expressed in the "slippery slope" analogy. If a court may dismiss an entire element of damages on its own conclusion that the attorneys' fees claimed as damages are excessive, or unreasonable, this may not stop with malicious prosecution cases. This could lead to the arbitrary and capricious use of summary judgment to clear a court's docket, thus denying numerous plaintiffs of their Constitutional right to a jury trial under the Seventh Amendment.

WHEREFORE, Petitioners respectfully pray that a writ of certiorari be granted.

Respectfully submitted,

ROY R. WITHERS,

Attorney for Petitioners

APPENDIX A

Filed December 31, 1996

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN G. JACKSON, et al., Plaintiffs, v. THE TRUTH SEEKER COMPANY, INC.; THE ESTATE OF JAMES HERVEY JOHNSON, et al., Defendants.	Nos. 95-55310 95-55501 D.C. No. CV-87-1441-MR Lead Docket
THE ESTATE OF JAMES HERVEY JOHNSON, and THE TRUTH CO., INC., a New York corporation, Counter-Claimants, Appellants, v.	

JOHN G. JACKSON, et al., Counter-Defendants Appellees	
LAWRENCE Y. TRUE, Trustee of the James Hervey Johnson Charitable Educational Trust and the Truth Seeker Trust; THE TRUTH SEEKER COMPANY, INC., Plaintiffs-Counter-Claimants-Appellants v. JOHN G. JACKSON, et al., Defendants/Counter-Defendants-Appellees,	D.C. No. CV 91-00494-MR
JOHN G. JACKSON, et al., Plaintiffs, v. THE TRUTH SEEKER COMPANY, INC.; THE ESTATE OF JAMES HERVEY JOHNSON, et al., Defendants.	No. 95-55589 D.C. No. CV 87-1441-MR

THE ESTATE OF JAMES HERVEY JOHNSON; THE TRUTH COMPANY, INC.,
Counter-Claimants
Appellees,
v.
JOHN G. JACKSON, et al.,
Counter-Defendants
and
MADALYN MURRAY-O'HAIR, et al.,
Defendants
Counter-Defendants
Appellants

LAWRENCE Y. TRUE, Trustee of the James Hervey Johnson Charitable Educational Trust and the Truth Seeker Trust; THE TRUTH SEEKER COMPANY, INC.,
Plaintiffs-Counter-Claimants-Appellees,
v.

D.C. No. CV 91-00494-MR

JOHN G. JACKSON, a private individual; Defendant/Counter-Defendant, and MADALYN MURRAY-O'HAIR, et al., Defendants/Counter-Defendants-Appellants	)	MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Manuel L. Real, District Judge, Presiding
Argued and Submitted April 9, 1996
Pasadena, California

BEFORE: SCHROEDER and LEAVY, Circuit Judges, and TRIMBLE**, District Judge

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3

** The Honorable James T. Trimble, Jr., United States District Judge for the Western District of Louisiana, sitting by designation.

Plaintiffs appeal the district court's denial of their request for a jury trail in their unfair competition, trademark, tradename infringement, Lanham Act, and RICO action(also known as the "Johnson action") and malicious prosecution action (the True action). Plaintiffs also appeal from the districts court's judgment in favor of the defendant's on the substantive claims because uncontroverted evidence was presented by Plaintiffs as to material facts in existence. Appeal Nos. 95-55501 and 95-5310. Defendants appeal the district court decisions denying attorneys' fees and sanctions and calculating the amount of costs taxed for defendants pursuant to Rule 54 (d) of the Federal Rules of Civil procedure. Appeal No. 95-55589.

The right to a jury in a civil case is granted by either the United States Constitution, a state constitution, or a statute that creates a cause of action different from that of the common law. Neither party has pointed to any statutory of state constitutional right that guarantees plaintiffs a jury trail for the recovery of attorneys' fees. therefore, the right to a jury trial in this matter is grounded in the U.S. Constitution and in federal law. *Simler v. Conner*, 371 U.S. 221, 222, (1963). The Seventh Amendment of the U.S. Constitution provides that "[i]n suits at common la, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved..."

With respect to the district court's decision to strike the jury trial in the Johnson action, plaintiffs failed to prove damages in excess of twenty dollars. Although plaintiffs argue that various moneys were involved that exceeded twenty dollars, this court agrees with the district court's findings that any such moneys were contributions to a legal defense fund that could not be considered a part of plaintiffs' damages. This court also agrees with the lower court decision that the uncontroverted facts that plaintiffs raise again on appeal are not helpful to plaintiff's case and are not indicative of material facts in existence.

The court, however, disagrees with the district court's decision to strike the jury trial in the malicious prosecution action because plaintiffs alleged damages in excess of twenty dollars resulting from attorneys' fees spent in the underlying suit. In *Bertero v. National General Corp.*, 118 Cal. Rptr. 184 (Cal. 1976), the California Supreme Court acknowledged that the attorneys' fees incurred in defending against an underlying action could be claimed as damages in a later malicious prosecution action, stating:

> The malicious commencement of civil proceeding is actionable because it harms the individual against whom the claim is made, and also because it threatens the efficient administration of justice. The individual is harmed because he is

> compelled to defend against a fabricated claim which not only subjects him to the panoply of psychological pressures most civil defendants suffer, but also to the additional stress of attempting to resist a suit commenced out of spite or ill will, often magnified by slanderous allegations in the pleadings. In recognition of the wrong done the victim of such tort, settled law permits him to recover the cost of defending the prior action including reasonable attorney's fees.

Id. at 190 (citations omitted and emphasis added).

Similarly, in a case involving a claim of malicious prosecution with respect to a civil claim, this court in *Von Brimer v Whirlpool Corp.*, F. 2d 838 (9th Cir. 1976), stated that:

> The range of damages potentially recoverable in a malicious prosecution action in California is strikingly broad. Damages may be recovered for a loss of time, deprivation of liberty, injury to fame, reputation, character, social or mercantile standing, mental suffering, injury to credit, and for sums expended in defending the unfounded lawsuit.

Id. at 847 (citations omitted and emphasis added).

Nevertheless, because the plaintiffs presented no evidence of the reasonableness of the attorneys' fees claimed as damages, we hold that the district court properly granted summary judgment in favor of the defendants. While plaintiffs did offer evidence that attorneys' fees were incurred and paid, they point to nothing in the record supporting the reasonableness of the fees. Fed. R. Civ. P.56. On the single occasion when plaintiffs attempted to introduce evidence of the reasonableness of the fees, the court properly sustained the defendants' objection. (The question was obviously leading.) RT Vol. II at 339. Because the district court properly granted summary judgment in favor of the defendants, the issue of a jury became moot.

Finally, this court is asked to address whether the district court erred in denying defendants' requests for attorneys' fees and sanctions and miscalculated the amount of costs taxed for defendants. Defendants, however, have failed to provide a sufficient showing that the district court abused its discretion in denying an award of attorneys' fees or sanctions. Furthermore, this court sees no error in the district court's calculations of the amount of costs taxed in this matter.

AFFIRMED

APPENDIX B

Filed June 3, 1997

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN G. JACKSON, et al., Plaintiffs, v. THE TRUTH SEEKER COMPANY, INC.; THE ESTATE OF JAMES HERVEY JOHNSON, et al., Defendants.	Nos. 95-55310 95-55501 D.C. No. CV-87-1441-MR Lead Docket
THE ESTATE OF JAMES HERVEY JOHNSON, and THE TRUTH CO., INC., a New York corporation, Counter-Claimants, Appellants, v. JOHN G. JACKSON, et al., Counter-Defendants Appellees	

LAWRENCE Y. TRUE, Trustee of the James Hervey Johnson Charitable Educational Trust and the Truth Seeker Trust; THE TRUTH SEEKER COMPANY, INC., Plaintiffs-Counter-Claimants-Appellants v. JOHN G. JACKSON, et al., Defendants/Counter-Defendants-Appellees,	D.C. No. CV 91-00494-MR
JOHN G. JACKSON, et al., Plaintiffs, v. THE TRUTH SEEKER COMPANY, INC.; THE ESTATE OF JAMES HERVEY JOHNSON, et al., Defendants.	No. 95-55589 D.C. No. CV 87-1441-MR

THE ESTATE OF JAMES HERVEY JOHNSON; THE TRUTH COMPANY, INC.,
Counter-Claimants
Appellees,
v.
JOHN G. JACKSON, et al.,
Counter-Defendants
and
MADALYN MURRAY-O'HAIR, et al.,
Defendants
Counter-Defendants
Appellants

LAWRENCE Y. TRUE, Trustee of the James Hervey Johnson Charitable Educational Trust and the Truth Seeker Trust;
THE TRUTH SEEKER COMPANY, INC.,
Plaintiffs-Counter-Claimants-Appellees,
v.

D.C. No. CV 91-00494-MR

JOHN G. JACKSON, a private individual; Defendant/Counter-Defendant, and MADALYN MURRAY-O'HAIR, et al., Defendants/Counter-Defendants-Appellants	ORDER

BEFORE: SCHROEDER and LEAVY, Circuit Judges, and TRIMBLE**, District Judge

The court has been informed of the filing of petitions in the bankruptcy of Madalyn E. O'Hair, Jon Garth Murray, and Robin Murray-O'Hair on March 21,1997. The action was stayed as to them as of the date pursuant to 11 U.S.C. § 362 (a). On March 24, 1997, we issued our order denying the appellants' petition for rehearing, and the clerk issued the mandate in this case on April 1, 1997.

It is HEREBY ORDERED that with respect to defendants-appellees Madalyn E. O'Hair, Jon Garth Murray, and Robin Murray-O'Hair the mandate be recalled, our

** The Honorable James T. Trimble, Jr., United States District Judge for the Western District of Louisiana, sitting by designation.

order denying the petition for rehearing be set aside, and the action against them stayed.

APPENDIX C

Filed March 24, 1997

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN G. JACKSON, et al., Plaintiffs, v. THE TRUTH SEEKER COMPANY, INC.; THE ESTATE OF JAMES HERVEY JOHNSON, et al., Defendants.	Nos. 95-55310/95-555 D.C. No. CV-87-1441-M (Southern California)
THE ESTATE OF JAMES HERVEY JOHNSON, and THE TRUTH CO., INC., a New York corp., Counter-Claimants/Appellants, v. JOHN G. JACKSON, et al., Counter-Defendants/Appellees	

BEFORE: SCHROEDER and LEAVY, Circuit Judges, and TRIMBLE**, District Judge

The panel has voted to deny the petition for rehearing. The petition is therefore DENIED.

** The Honorable James T. Trimble, Jr., United States District Judge for the Western District of Louisiana, sitting by designation.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Filed November 21, 1997

JOHN G. JACKSON, et al., Plaintiffs, vs. THE TRUTH SEEKER COMPANY, INC., et al., Defendants.	CASE NOS.:	87-1441-K (LSP) 91-0494-K (LSP) OPINION
AND RELATED COUNTERCLAIM		
LAWRENCE TRUE, Trustee of the James Hervey Johnson Charitable Educational Trust and the Truth Seeker Trust; and THE TRUTH		

SEEKER COMPANY, INC.,
Plaintiffs
vs.
JOHN G. JACKSON, a private individual; et al.,
Defendants.

OPINION AND ORDER

The court held a non-jury trial concurrent with a hearing to determine whether there were any material facts in dispute on defendants' Rule 12(b) motion which was being considered as a motion for summary judgment. For the reasons stated below, the court ordered judgment in favor of the defendants.

I. FACTUAL BACKGROUND

This matter involves two law suits and a counterclaim. These three cases essentially boil down to a controversy between John G. Jackson and Madalyn O'Hair on one side and James Hervey Johnson on the other. The dispute concerns the promulgation of atheist ideology and the survival of the Truth Seeker Company, Inc. ("TSC, Inc.") and The Truth Seeker, the publication established to spread atheist doctrine throughout the English speaking world. These matters are complicated only in the sense that parties who were, at best, observers of the Jackson-O'Hair-Johnson dispute were caught in the elaborate web of Johnson's

counterclaims. A brief history of TSC, Inc. and the key players in these cases will go a long way in unraveling the confusion.

The Truth Seeker magazine was initiated in 1873. In 1940, one Charles Smith took over operation of The Truth Seeker and filed articles of incorporation in New York, thus creating TSC, Inc. The articles specifies perpetual life and authorized issuance of 200 shares of stock with a provision for the issuance of more.

In the early 1960s, Smith presented O'Hair and Jackson, on separate occasions, with stock interests in TSC, Inc. because of the work they had done for his company and the atheist movement in general.[1] However, no evidence of stock ownership resulting from these transfers survives. O'Hair was never issued a stock certificate although there is no evidence that a stock certificate was not issued and held by Smith. Jackson claims that his stock certificates were either lost during a move or thrown away because he thought they had no pecuniary value. Furthermore, at the time she was given a stock interest, O'Hair was asked to take over the publication of The Truth Seeker, which she declined to do.

---

[1] Notably, Smith was grateful to O'Hair for having won a significant victory for the atheist movement in the United States Supreme Court case School District of Abington Township v. Schempp, 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963).

Charles Smith died in 1964. Prior to his death, Smith moved to San Diego, California and there he joined up with Johnson. After Smith's death Johnson, acting as president of TSC, Inc., continued to publish the magazine although it remains unclear as to how Johnson came into possession of the corporate structure. No evidence was presented at trial of Johnson's ownership or inheritance of TSC, Inc. In 1981, 1983 and 1984 O'Hair requested that Johnson relinquish management and control of TSC, Inc. and its publication. Johnson refused. Meanwhile, under his stewardship, The Truth Seeker's subscribers list dwindled from 25,000-30,000 to 200-400 subscribers by 1987.

Nineteen eighty-seven was a busy year in this saga. O'Hair felt particular urgency in taking over The Truth Seeker for the benefit of the atheist movement because she was worried about Johnson's advanced age and poor health and the drastic decline in subscriptions. Besides these concerns, O'Hair was further troubled because she had recently learned that Johnson's will left all his property in an open-ended trust to be administered by Lawrence Y. True, a non-atheist. O'Hair enlisted Stephen B. Thorne and Robin Shelly to assist Johnson in publication of The Truth Seeker as well as to obtain evidence of wrongdoing by Johnson in the conduct of TSC, Inc. and its sister non-profit organizations, American Association for Advancement of

Atheism and The National Liberal League[2]. It paid off because Thorne observed Johnson commingling finds from these organizations with his own. He appraised O'Hair of the commingling.

Additionally, in the summer of 1987, O'Hair regularly noticed a meeting of shareholders and other atheist "regulars" and "old-timers" interested in The Truth Seeker. A notice of the meeting was sent personally to Johnson; he did not attend. The meeting was held in Austin, Texas, the situs of O'Hair's offices and of a new corporation named Truth Seeker of Austin, Inc. ("TSA, Inc."). At this meeting O'Hair was elected to office by the persons present.

From June 1988 to September 1989 O'Hair distributed, without charge to anyone, a series of three newsletters, appropriately, titled The Truth Seeker Newsletter, detailing publicly her efforts to re-start a viable atheist publication, Johnson's activities at TSC, Inc. and the progress of the lawsuits concerning Johnson and the defendants in both cases. Moreover, O'Hair attempted to freeze TSC, Inc.'s assets pending resolution of the litigation then in progress and in contemplation of future litigation to determine corporate ownership. In her capacity as an officer of TSA, Inc., she presented a corporate resolution to

---

[2] Johnson was allegedly the president of these not-for-profit corporations.

the bank and post office to re-route TSC, Inc. mail to a post office box under Thorne's control in Escondido, California. No TSC, Inc. funds were ever withdrawn nor did any damage result to Johnson or the corporation from these actions.

Furthermore, in early 1987 O'Hair first learned that Jackson had also received a stock interest from Smith in TSC, Inc. After O'Hair informed Jackson of Johnson's misconduct which Thorne had reported, O'Hair and Jackson decided to obtain the advise of a lawyer, John W. Vinson, who was in the employ of O'Hair's companies in Texas. They were advised by Vinson that he had researched the matter and that Jackson could file a stockholder's suit in California to require an accounting by Johnson of TSC, Inc. activities. Jackson took the attorney's advice.

II. PROCEDURAL HISTORY

In October 1987, Jackson as a shareholder of TSC, Inc., instituted the first law suit against defendants TSC, Inc., James Hervey Johnson[3] , and the two not-for profit corporations, American Association for Advancement of Atheism and the National Liberal League [hereinafter "the Jackson case"]. Alleging that Johnson commingled TSC money with his own, misappropriated funds into his

---

[3] James Hervey Johnson was the originally named defendant. On August 6, 1988 Johnson died and his estate took his place in the law suit.

personal accounts and generally mismanaged the accounts and the book distribution business of TSC, Inc., Jackson sought an accounting and other relief concerning the operation of TSC, Inc.

On this underlying action, the Estate filed a counterclaim for itself and TSC, Inc. against several defendants, the most important for the purposes of this opinion being Jackson and O'Hair[4] [hereinafter "the Johnson case"]. The counterclaim was brought for (1) conversion; (2) trademark/tradename infringement; (3) conversion and infringement of common law rights; (4) violation of the Lanham Act (15 USC § 1125 (a)); (5) RICO (18 USC §1962 (b)); (6) conduct of an enterprise involving interstate commerce through a pattern of racketeering activity (18 USC 1962 (c)); and (7) conspiracy to violate 18 USC 1962 (b) racketeering activity to acquire/maintain interest/control of an enterprise engaged in/affecting interstate commerce.

---

[4] The other defendants are Jon Garth Murray, Robin Murray O'Hair, Arnold Via, Robin Shelley, all individuals, and American Atheist G.H.Q., Inc., aka American Atheist Center, a Texas corporation; The Society of Separationists, Inc., a Maryland corporation; American Atheists, Inc., a Texas corporation; Charles E. Stevens American Atheist Library and Archives, Inc., a Texas corporation; American Atheist Press, Inc., aka Gustav Broukal Press, a Texas corporation; United World Atheists, Inc., a Texas corporation. During the pendency of the Jackson case, the counterclaimants dismissed defendants Via, Thorne and Shelly.

On April 11, 1991 a second law suit was filed by True, trustee of the James Hervey Johnson Charitable Educational Trust and the Truth Seeker Trust, both created by the will of Johnson [hereinafter "the True case"]. This action was brought for malicious prosecution against Jackson and O'Hair as well as a familiar cast of other defendants[5].

Subsequently, the Jackson case fell victim to summary judgment because Jackson could not produce the stock certificates he claimed were given to him by Smith. The Johnson case and the True case were consolidated and proceeded as a jury trial. This proceeding ended in a deadlocked jury. A mistrial was declared and the matter then came before me for a new trial.

Defendants moved to have the new trial proceed as a non-jury trial. First, they argued that the evidence at the first trial established that Johnson and True had not suffered damages of twenty dollars or more, the threshold requirement which triggers the constitutional right to a civil trial by jury as guaranteed by the Seventh Amendment.

---

[5] The defendants are John W. Vinson, attorney of record for the filing of the Jackson case; American Atheist G.H.Q., Inc., aka American Atheist Center, a Texas corporation; The Society of Separationists, a Maryland corporation; American Atheists, Inc., a Texas corporation; Charles E. Stevens American Atheists Library and Archives, Inc., a Texas corporation; American Atheist Press, Inc., aka Gustav Broukal Press, a Texas corporation; and United World Atheists, Inc., a Texas corporation.

Second, there was no federal or state statute creating a right to jury trial in an action for conversion, trademark/tradename infringement, malicious prosecution or for violations of the Lanham Act or RICO.

Ruling for the defendants, the court held that Johnson had failed to file a timely jury demand on the counterclaims or present proof of damage of twenty dollars or more in the first trial. The Johnson case was to proceed non-jury. As for the True case, the court found that the evidence showed that the plaintiffs had not suffered a minimum of twenty dollars in damages nor was there a statute providing for a jury trial in a malicious prosection (sic) action, and thus were not entitled to a civil jury trial.

On the eve of trial, defendants moved to dismiss all causes of action. Under the circumstances, the court decided that the maters proceed simultaneously on two-tracks– as a non-jury trial and a hearing to determine whether there were any material facts in dispute on the motion to dismiss which would now be treated as a motion for summary judgment on all claims.

III. DISCUSSION

A. Substantive Claims

If, as a matter of law, the lack of written evidence establishing stock ownership was fatal to Jackson's lawsuit so it must likewise be fatal to Johnson's and True's standing to claim ownership in TSC, Inc. or a proprietary interest in

The Truth Seeker. However, the court need not rely on the issue of standing to find for the defendants in this matter because the plaintiffs simply did not establish their prima facia (sic) case. During the non-jury trial/hearing, the plaintiffs failed to present evidence as to the following material facts:

1. That American Atheist G.H.Q., Inc. aka American Atheist Center, a Texas corporation; the Society of Separationists, Inc. a Maryland corporation; American Atheists, Inc., a Texas corporation; Charles E. Stevens American Atheist Library and Archives, Inc., a Texas corporation; American Atheist Press, Inc., aka Gustav Broukal Press, a Texas corporation; and United World Atheists, Inc., a Texas corporation are the alter egos of any of the defendants;
2. That the corporations listed in paragraph one were aware of activities of Jackson or O'Hair in bringing the Jackson case until Johnson's counterclaim was filed in 1988;
3. That any of the corporate defendants had any knowledge of TSA, Inc. activity until after the counterclaim was filed in 1988;
4. That defendants Robin Murray-O'Hair, John (sic) Garth Murray, or the corporate defendants ever

authorized or ratified any attempt to take-over (sic) TSC, Inc.;

5. That any person was confused or likely to be confused as to the source of the San Diego-issued The Truth Seeker and the Austin-issued The Truth Seeker Newsletter;

6. That any act performed by any defendant was done for any fraudulent purpose;

7. That any defendant gained any profit by reason of any act performed during the relevant period encompassed by these cases;

8. That any defendant acted with any motive or ill will toward plaintiffs;

9. That the amounts incurred and paid as attorneys' fees by plaintiffs were reasonable or necessary to the prosecution of these actions; the inference is to the contrary that these fees are in fact exorbitant;

10. That they suffered any damage resulting from the defendants' alleged conduct underlying either the Johnson or True cases.

At trial, this failure of proof equates to a verdict for the defendants. If treated as the defendants' motion for summary judgment, this court is required to grant the motion. "(S)ince a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial (,) (t)he moving party is

'entitled to a judgment as a matter of law.'" Celotex Corp. v. Catrett, 477 U.S. 371, 106 S. Ct. 2548, 91 L. Ed. 265 (1986).

Moreover, the uncontroverted facts that were presented during this proceeding do not aid the plaintiffs' cases. The facts that O'Hair had been told by Thorne of his witnessing of Johnson's commingling and that O'Hair and Jackson sought and followed the advice of counsel provide the necessary probable cause for bringing the Jackson case. These facts defeat the charge of malicious prosecution. "'Hair and TSA, Inc.'s mere re-routing of TSC, Inc.'s mail does not legally support any claim of mail or wire fraud, which are necessary as predicate acts in a RICO claim. Nor does any of the conduct amount to any illegal action by O'Hair that would give rise to RICO consideration.

Based on the forgoing (sic), it does not matter whether the court treated these proceedings as a non-jury trial or a hearing on defendants' motion to dismiss that the court sua sponte considered as a motion for summary judgment. In either instance, the court would order, and does order, judgment for the defendants.

B. The Jury Issue

The issue on the right to a jury trial in the True case for malicious prosecution was raised by the defendants' motion in limine on the grounds that plaintiffs had neither a constitutional nor statutory right to a civil jury trial. The right to a jury trial in a civil case is conferred by the United

States Constitution, by a state constitution or by a statute that creates a cause of action different from the common law. In a malicious prosecution action, there is no statutory right to a jury trial. Absent such a statute, the right to a jury trial in federal court is a matter of federal law. Simler v. Conner, 371 U.S. 221, 222, 9 L. Ed. 2d 91, 693 (1963). Therefore, if plaintiffs can successfully assert a right to a civil jury trial, it must be grounded in the Seventh Amendment of the United States Constitution.

The Seventh Amendment provides that "(i)n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved ..." To maintain that right the controversy must exceed twenty dollars. It is because the plaintiffs' (sic) in their first trial failed to prove twenty dollars or more in damages that the court decided to proceed without a jury on the malicious prosecution claim at the second trial.

Malicious prosecution at common law was an action for recovery of damages resulting to a person, a person's property or a person's reputation from an unsuccessful proceeding, either civil or criminal. The testimony at the first trial showed that neither Johnson nor his estate suffered damages resulting from the action filed. At common law, attorneys' fees were not recoverable as an element of damages. Stewart v .Sonneborn, 98 U.S. 187, 25 L. Ed. 116 (1878). Since Johnson offered no evidence of cognizable

common-law damage to his person, business or reputation that would meet the constitutional minimum, the case does not qualify under the Seventh Amendment for a jury trial.

As a matter of first impression and perhaps as just a curious incursion into constitutional interpretation, the twenty dollar threshold of the Seventh Amendment right to a jury trial in civil cases ought to be brought into the imminent reality of the 21st century. The twenty dollar requirement seems lost in its applicability to today's world. A party in a federal question case may demand a jury if the claims exceeds twenty dollars. However, if that same party wants a federal jury to decide the claim in a diversity of citizenship case, perhaps one involving the same conduct, to even get in the door of a federal courthouse the claim must exceed $50,000.

Perhaps the larger issue to be considered is whether or not there is any sanction for construing otherwise clear and unequivocal language in the Constitution to accommodate changes in the historical development of the law. In this instance, is a threshold of twenty dollars part of the constitutional guarantee or is it only a measure of the importance of the matter such that it requires presentation to a jury of so-called peers? Or can this "threshold" be treated merely as an extension of fact finding without a jury under the rubric of equity? See Note, The Right to a Non-Jury Trial, 74 Harv. L. Rev. 1176, 1181 (1961).

To justify construction of the Constitution in this manner, the basic question ought to be does a change in the monetary requirement of a jury trial do any violence to the fundamental purpose of a jury trial. The absurdity of requiring six or twelve citizens to sit in judgment of a controversy involving as little as $21 is obvious. Even in the world of strict constructionists vs. activists, there should be little debate that perhaps the twenty dollar threshold is not essential to the operation of a viable jury system. The twenty dollar threshold cannot be reached in this case, however, under any interpretation of the Seventh Amendment. Therefore, pursuant to Federal Rule of Civil Procedure 39 (a) (2), this court finds that these plaintiffs do not have a right to a jury trial.

There is yet another problem in this case. The plaintiffs fully participated in the proceedings. They could have refused to go forward with the non-jury trial. Instead, the plaintiffs chose to present their case in its entirety. Assuming a right to jury trial existed in this case, such conduct has been held to be a waiver of that right. See White v. McGinnis, 903 F.2d 699, 703 (9th Cir. 1990) cert. denied 498 U.S. 903 (1990); Royal American Mgrs., Inc. v. IRC Holding Corp., 885 F.2d 1011, 1018 (2d Cir. 1989); Lovelace v. Dall, 820 F.2d 223, 227-29 (7th Cir. 1987) (per curium); United States v. 1966 Beechcraft Model King Air

A90 Cream, 777 F.2d 947, 950-51 (4th Cir. 1985); Allen v. Barnes Hosp., 721 F.2d 643, 644 (8th Cir. 1983).

The opinion in White v. McGinnis is instructive. In White, the plaintiff, despite having filed a demand for jury trial, participated in the two-day bench trial. White, 903 F.2d at 703. After losing, the plaintiff complained that he had not waived his right to jury trial as set forth by Federal Rule of Civil Procedure 39 (a) (1), and thus was denied his constitutional right. Id. The plaintiff's claim was really an effort to get a second bite at the apple; the court of appeals clearly saw the attempt for what it was. The Ninth Circuit stated,

> A party's vigorous participation in a bench trial, without so much as a mention of a jury, cannot be presumed the result of mere inadvertence, but can only be ascribed to knowledgeable relinquishment of the prior jury demand. This is especially so where, as here, "the (objecting) party was 'on notice that the trial court was planning to adjudicate the dispositive issues of fact.'" ... "(C)ourt judgments should have meaning and effect instead of being a futile exercise that one of the parties will be able to overturn no matter what the result." The appellant chose to argue his case fully before the district judge; it is not unjust to hold him to that commitment.

Id. (citations omitted).

In the True case, the plaintiffs vigorously advocated the matter, from lengthy opening statement to post trial submission of proposed findings of fact and conclusions of law. The record reflects that the plaintiffs were fully apprised that this matter was being heard without a jury, that the proceeding was both a non[jury trial and a hearing on a motion for summary judgment, and that dispositive issues of act were to be determined by the presiding judge. They could have filed a writ of mandamus or sought an interlocutory appeal to halt the proceedings. But for an objection in order to "make the record," the plaintiffs' conduct clearly indicated they acquiesced to the manner in which the case was to proceed. Therefore, even if the plaintiffs had a right to a jury trial, they have waived that right by their conduct. The estate of James Hervey Johnson had its full day in court.

///
///
///
///
///
///
///
///
///
///

IV. CONCLUSION

Treating the evidence presented to the court either as a motion for summary judgment determining material facts without controversy or as a trial on the merits judgment shall be for the defendants. Judgment shall be entered accordingly.

Dated: November 16, 1994.

/s/ MANUEL L. REAL

MANUEL. L. REAL
UNITED STATES DISTRICT
JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT

Filed November 23, 1994

SOUTHERN DISTRICT OF CALIFORNIA

JOHN G. JACKSON, ET AL.

V.

THE TRUTH SEEKER CO, INC. ET AL.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 87-1441K (LSP)
91-0494K (LSP)

☐ Jury Verdict. This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that treating the evidence presented to the court either as a motion for summary judgment determining material facts without controversy or as a trial on the merits judgment shall be for the defendants.

NOVEMBER 23, 1994 /s/ ROBERTA WESTDAL
Date *Clerk*

/s/ PATRICIA L. ALBEDA
(By) Deputy Clerk

ENTERED ON 11/23/94

APPENDIX F

Rules of the Supreme Court of the Unites States:

Supreme Court Rules, Rule 29.6 (1997)

Rule 29. Filing and Service of Documents; Special Notifications; Corporate Listing.

(6) Every document, except a joint appendix or *amicus curiae* brief, filed by or on behalf of one or more corporations shall list all parent companies and nonwholly owned subsidiaries of each of the corporate filers. If there is no parent or subsidiary company to be listed, a notation to this effect shall be included in the document. If a list has been included in a documents filed earlier in the case, reference may be made to the earlier document (except when the earlier list appeared in an application for an extension of time or for a stay), and only amendments to the list to make it current need to be included in the document being filed.

APPENDIX G

United States Code - Title 28 (Judiciary and Judicial Procedure):

28 U.S.C. § 1254 (1) (1997)

§ 1254 Courts of Appeals; Certiorari; Certified Questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court appeals on any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

APPENDIX H

United States Bankruptcy Code - Title 11:

11 U.S.C. § 362(a), (c). Automatic Stay (1997):

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of –

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against the property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and,

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(c) Except as provided in subsection (d), (3), and (f) of this section --

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the earliest of –

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11,12, 9r 13 of this title, the time a discharge is granted or denied.

APPENDIX I

California Code of Civil Procedure § 1032 (1997):

C.C.P. § 1032. Prevailing Party In Any Action Or Proceeding, Stipulation To Alternative Procedures

(a) As used in this section, unless the context clearly requires otherwise:

(1) "Complaint" includes a cross-complaint.

(2) "Defendant" includes a cross-defendant or a person against whom a complaint is filed.

(3) "Plaintiff" includes a cross-complainant or a party who files a complaint in intervention.

(4) "Prevailing Party" includes the party with a monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover

any relief against that defendant. When any party recovers other than monetary relief and in situations other than as specified , the "prevailing party" shall be as determined by the court, and under those circumstances, the court, in its discretion, any allow costs or not and, if allowed may apportion costs between the parties on the same or adverse sides pursuant to rules adopted under Section 1034.

APPENDIX J

California Civil Code § 3360 (1997):

§ 3360. Nominal Damages

NOMINAL DAMAGES. When a breach of duty has been caused no appreciable detriment to the party affected, he nay yet recover nominal damages.

APPENDIX K

Federal Rules of Civil Procedure, Rule 56(c):

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a mater of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Supreme Court, U.S.
FILED
OCT 20 1997
CLERK

No. 97-328

In The
Supreme Court
of the United States

October Term 1997

THE TRUTH SEEKER COMPANY, INC.; and,
LAWRENCE Y. TRUE,
Trustee of the James Hervey Johnson Charitable
Educational Trust and the Truth Seeker Trust.,

Petitioners,

v.

JOHN G. JACKSON, et al.

Respondents,

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI

Scott E. Schutzman, Esquire
Counsel of Record
LAW OFFICES OF SCOTT E. SCHUTZMAN
219 E. Washington Ave.
Santa Ana, CA 92701
(714) 543-3638
Attorneys for Respondents
John G. Jackson, et al.

81

U.S. SUPREME COURT RULE, RULE 29.6[1] STATEMENTS

Defendant/Appellee American Atheist General Headquarters (hereinafter "AAGHQ") is a Texas corporation with its principal place of business at 7215 Cameron Road, Austin, Texas.

Appellee American Atheist General Headquarters has no parent companies, subsidiaries, or affiliates. Appellee American Atheist General Headquarters does not issue shares of stock to the public.

Defendant/Appellee Society of Separationists (hereinafter, "SOS") is a Maryland corporation with its principal place of business at 7215 Cameron Road, Austin, Texas.

Appellee Society of Separationists has no parent companies, subsidiaries, or affiliates. Appellee Society of Separationists does not issue shares of stock to the public.

Defendant/Appellee American Atheists, Inc. (hereinafter, "AAI") is a Texas corporation with its principal place of business at 7215 Cameron Road, Austin, Texas.

Appellee American Atheists, Inc. has no parent companies, subsidiaries, or affiliates. Appellee American Atheists, Inc. does not issue shares of stock to the public.

Defendant/Appellee Charles E. Stevens American Atheist Library and Archives, Inc. (hereinafter, "CESAALA") is a Texas corporation with its principal place of business at 7215 Cameron Road, Austin, Texas.

Appellee Charles E. Stevens American Atheist Library and Archives, Inc. has no parent companies, subsidiaries, or affiliates. Appellee Charles E. Stevens American Atheist Library and Archives, Inc. does not issue shares of stock to the public.

Defendant/Appellee American Atheist Press, Inc. (hereinafter

---

1. Respondents set forth in full Rule 29.6 of the U.S. Supreme Court Rules in Appendix G, p. 37a of this Opposition's Appendix.

"AAP") is a Texas corporation with its principal place of business at 7215 Cameron Road, Austin, Texas.

Appellee American Atheist Press, Inc. has no parent companies, subsidiaries, or affiliates. Appellee American Atheist Press, Inc. does not issue shares of stock to the public.

Defendant/Appellee United World Atheists, Inc. is a Texas corporation with its principal place of business at 7215 Cameron Road, Austin, Texas.

Appellee United World Atheists, Inc. has no parent companies, subsidiaries, or affiliates. Appellee United World Atheists, Inc. does not issue shares of stock to the public.

PARTIES

Plaintiff/Appellant Lawrence Y. True, deceased[2], was Trustee of the James Hervey Johnson Charitable Educational Trust and the

---

2. Mr. True passed away on May 14, 1996. As Mr. True's death occurred many months before the 9th Circuit appellate decision came out on December 31, 1996, it is unclear what living or existing client Mr. Withers now represents. Further, it is unclear why Mr. Withers did not substitute a successor during the pendency of the case in the appellate court. Nevertheless, as of this date no representative or succerssor has substituted in for Mr. True.

Furthermore, Mr. True claimed to be the president and sole owner of the Truth Seeker, Inc. corporation. However, not only has no one substituted in for Mr. True, but also no one has substituted into this case as either president and/or owner of the Truth Seeker, Inc. corporation. Therefore, Mr. Withers has been without a client since May 14, 1996, and has failed to comply with the Federal Rules of Civil Procedure, Rule 25(a), and with Rule 35 of the Rules of the Supreme Court. [Respondents set forth Fed.R.Civ.P. Rule 25 (a) in Appendix I, p. 39a, and Rule 35 of the Rules of the Supreme Court in Appendix H, p. 38a, of this Opposition's Appendix.]

Consequently, Respondents object to this petition, as Mr. Withers appears to be engaged in an adventure - a frolic - of his own, unchecked and unbidden by any client.

[Respondents' recognition of Mr. True's asserted claim should not be deemed a concession as to the truth of the claim, especially, since Mr. True was never able to provide evidence or proof before or during the trial of March 28 through April 1, 1994. See Appendix B, p. 10a]

Truth Seeker Trust, which were created under California law in San Diego, California from the estate of James Hervey Johnson, deceased, and was at all times relevant herein a citizen of the State of California.

Plaintiff/Appellant Truth Seeker Company, Inc. is a New York corporation with its principal place of business in San Diego, California.

Defendant/Appellee Madalyn E. Murray O'Hair, an individual, was at all times relevant herein a citizen of the State of Texas[3].

Defendant/Appellee John G. Jackson, deceased, an individual was at all times relevant herein a citizen of the State of Illinois.

Defendant/Appellee John W. Vinson an individual, was at all times relevant herein a citizen of the State of Texas.

Defendant/Appellee American Atheist General Headquarters (hereinafter "AAGHQ") is a Texas corporation with its principal place of business at 7215 Cameron Road, Austin, Texas.

Defendant/Appellee Society of Separationists (hereinafter, "SOS") is a Maryland corporation with its principal place of business at 7215 Cameron Road, Austin, Texas.

Defendant/Appellee American Atheists, Inc. (hereinafter, "AAI") is a Texas corporation with its principal place of business at 7215 Cameron Road, Austin, Texas.

Defendant/Appellee Charles E. Stevens American Atheist Library and Archives, Inc. (hereinafter, "CESAALA") is a Texas corporation with its principal place of business at 7215 Cameron Road, Austin, Texas.

Defendant/Appellee American Atheist Press, Inc. (hereinafter "AAP") is a Texas corporation with its principal place of business at 7215 Cameron Road, Austin, Texas.

Defendant/Appellee United World Atheists, Inc. is a Texas corporation with its principal place of business at 7215 Cameron Road, Austin, Texas.

---

3. On October 7, 1997, the United States Court of Appeals For The Ninth Circuit vacated its June 3, 1997, order staying the action against Madalyn E. O'Hair, Jon Garth Murray, and Robin Murray-O'Hair. The petition for rehearing was also denied as to these Respondents. [The Order for the Ninth Circuit Court of Appeals is set forth in Appendix C, p. 24a of this Opposition's Appendices.

The above-referenced Corporate Defendants are hereinafter referred to collectively as "Corporate Defendants."

TABLE OF CONTENTS

U.S. SUPREME COURT RULES, RULE 29.6 STATEMENTS i

PARTIES ii

TABLE OF CONTENTS v

TABLE OF AUTHORITIES ix

PETITIONERS' PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS AND JUDGMENTS ENTERED IN THE COURTS BELOW 1

STATEMENT OF THE CASE 2

I. Pertinent Procedural History 2

II. Statement of Facts 4

III. District Court's Rulings As To Petitioners' Failure To Prove Case 9

IV. Appellate Court's Rulings Affirming The District Court 12

REASONS FOR DENYING THE WRIT OF CERTIORARI 14

I. Counsel Filing The Petition Does Not Have A Client To Represent, As Petitioner Lawrence Y. True Died On May 14, 1996; Therefore The Petition For Writ Of Certiorari Should Be Rejected In Its Entirety. 14

II. Petitioners Have Failed To Offer Any Compelling Reason Either For This Court To Review And Reverse The Lower Courts' Factual Determinations/ Conclusions Of Law, Or Why This Court Should Entertain Questions Not Raised To The Appellate Court. 16

1. Issues Not Raised To Appellate Court 16

2. No Compelling Reason Provided To Invoke This Court's Grant Of The Petition 17

III. Petitioners' Claims Are Misguided Because The Ruling Of The Appellate Court Simply Affirmed The District Court's Holding That Petitioners' Failed To Prove A

Prima Facie Case During the Trial; Therefore, Since No Material Issues Were Shown To Exist, Summary Judgment Was Indeed Appropriate. 20

IV. The Petition For Writ of Certiorari Should Be Rejected Because During The Trial Petitioners Failed To Submit Any Evidence Of the Reasonableness Of Their Damages And Now Misstate The Law Concerning Such Evidentiary Requirements..... 22

CONCLUSION 28

APPENDICES

Appendix A: Memorandum of the United States Court of Appeals for the Ninth Circuit 1a

Appendix B: Opinion of the United States District Court for the Southern District of California... 8a

Appendix C: Opinion of the United States Ninth Circuit Court of Appeals, Vacating June 3, 1997, Order. 24a

Appendix D: Pertinent Excepts From Reporters Transcript, Pages 338 through 343: Examination and Testimony of Lawrence Y. True 28a

Appendix E: U.S. Supreme Court Rule 10 ..... 34a

Appendix F: U.S. Supreme Court Rule 15.2 ..... 36a

Appendix G: U.S. Supreme Court Rule 29.6 ..... 37a

Appendix H: U.S. Supreme Court Rule 35 ..... 38a

Appendix I: Federal Rule of Civil Procedure, Rule 25(a) 39a

Appendix J: Federal Rule of Civil Procedure, Rule 56(c) 40a

Appendix K: Death Certificate for Lawrence Y. True. 41a

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES:

Adickes v. S. H. Kress & Co.,
398 U.S. 144, 90 S.Ct. 1598 (1970) 16

Celotex Corp. v. Catrett,
477 U.S. 317, 326, 106 S.Ct. 2548 (1986) 12, 21

Lawn v. United States,
355 U.S. 339,78 S.Ct. 311 (1958), reh den,
355 U.S. 967, 78 S.Ct. 529 17

FEDERAL CASES:

Hanon v. Dataproducts Corporation,
976 F.2d 497 (9th Cir. 1992) 21

Jackson v. Bank of Hawaii,
902 F.2d 1385, 1389 (9th Cir. 1990) 21

Jackson v. Truth Seeker Company, Inc.,
884 F. Supp. 370 (S.D. Cal. 1994) 2

Paragon Podiatry Laboratory v. KLM Laboratories,
984 F.2d 1182, 1184-85 (Fed. Cir. 1993) 20

Portsmouth Square v. Shareholders Protective Comm.,
770 F.2d 866, 869 (9th Cir. 1985) 21

CALIFORNIA STATE CASES:

Stevens v. Chisholm,
179 Cal. 557, 178 P. 128 (1919) 23, 24

SUPREME COURT RULES:

Supreme Court Rules, Rule 10 ..... 17, 18

Supreme Court Rules, Rule 29.6 i

Supreme Court Rules, Rule 35 ii

Supreme Court Rules, Rule 42 30

UNITED STATES CODES AND STATUTES:

28 United States Code §1254(1) 16

FEDERAL RULES AND STATUTES:

Federal Rules of Civil Procedure, Rule 25 ii

Federal Rules of Civil Procedure, Rule 56 ..... 13, 20

PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

Petitioners, Lawrence Y. True, the deceased Trustee of the James Hervey Johnson Charitable Educational Trust and the Truth Seeker Trust, and the Truth Seeker Company, Inc., have sought a writ of certiorari to have reviewed the opinion and order of the United States Court of Appeals for the Ninth Circuit, which affirmed the order of the United States District Court for the Southern District of California. The District Court granted both trial verdict and summary judgment against Petitioners, after it had held a concurrent non-jury trial and summary judgment hearing which had allowed Petitioners to introduce all evidence they had in support of their claims. The District Court found for Respondents because Petitioners' evidence was abjectly insufficient to prevail by either summary judgment or trial standards.

OPINIONS AND JUDGMENTS ENTERED IN THE COURTS BELOW

The December 31, 1996, opinion of the Court of Appeals, of whose judgment Petitioners seek review, which has been decertified for

publication, is set forth in Appendix A to this Opposition[4], pp. 1a-7a. The Order of the Court of Appeals denying Appellants' Petition for Rehearing is reprinted in the separate Appendix to Petitioners' Petition for Writ of Certiorari at pp. 14a-15a. The opinion of the Honorable Manuel L. Real, Judge, of the United States District Court for the Southern District of California in the case of Jackson v. Truth Seeker Company, Inc. found at 884 F. Supp. 370 (S.D. Cal. 1994), is also reprinted in Appendix B to this Opposition[5], at pp. 8a - 23a.

STATEMENT OF THE CASE

I. Pertinent Procedural History:

The two consolidated actions were scheduled for trial to begin on March 28, 1994[6]. The morning of the trial, Respondents moved to dismiss all causes of action. The District Court granted the motion to

---

4. Petitioners have made such numerous errors in setting forth the contents of the December 31, 1996 Appellate Court's opinion , that Respondents have had to reprint the opinion in this Opposition's Appendix A.

5. Petitioners have also made a plethora of errors in setting forth the contents of Judge Real's November 16, 1994, opinion, such that Respondents have had to reprint the opinion in this Opposition's Appendix B.

6. Respondents had timely filed motions in limine which inter alia, requested striking the jury.

strike the jury and decided that the matters would proceed simultaneously on two tracks: First, as a non-jury trial, and second as a hearing to determine whether there were any material facts in dispute, thereby treating Respondents' motion to dismiss sua sponte as a motion for summary judgment on all claims.

From March 28 through April 1, 1994, non-jury trial was held before the Honorable District Court Judge Real. Petitioners utilized all four days to present their case; nevertheless, Petitioners failed to present sufficient evidence in support of their allegations and to support a prima facie showing as to even one cause of action.. In fact, after Petitioners completed their presentation of evidence, it was so readily apparent that Petitioners had failed to prove their allegations that Respondents chose not to waste any more of the trial judge's time or to incur further litigation expenses, and thereupon by simply rested their case before putting on any defense.

On November 23, 1994, the District Court, sitting as trial judge and as the finder of fact, concluded that Petitioners failed to establish their prima facie case, and ruled:

"Treating the evidence presented to the court either as

a motion for summary judgment determining material facts without controversy or as a trial on the merits judgment shall be for the defendants."

[Appendix B, p. 23a.]

II. Statement of Facts:

Petitioners, in their fervor to advance their position, have entirely supplanted accuracy with advocacy. Consequently, Respondents hereby object to Petitioners' imaginative rendition of facts, as almost every statement of fact alleged by Petitioners in their petition is either (1) contradicted by the findings of the trial judge, or (2) unsupported by the trial record. Since the trial judge heard all evidence and sat as fact finder in the non-jury trial, Respondents adopt the District Court's factual determinations. The District Court's factual findings are set out, hereinbelow:

FACTUAL BACKGROUND

"This matter involves two law suits and a counterclaim. These three cases essentially boil down to a controversy

between John G. Jackson and Madalyn O'Hair on one side and James Hervey Johnson on the other. The dispute concerns the promulgation of atheist ideology and the survival of Truth Seeker Company, Inc. ("TSC, Inc.") and The Truth Seeker, the publication established to spread atheist doctrine throughout the English speaking world. These matters are complicated only in the sense that parties who were, at best, observers of the Jackson-O'Hair-Johnson dispute were caught in the elaborate web of Johnson's counterclaims. A brief history of TSC, Inc. and the key players in these cases will go a long way in unraveling the confusion."

"The Truth Seeker magazine was initiated in 1873. In 1940, one Charles Smith took over operation of the The Truth Seeker and filed articles of incorporation in New York, thus Creating TSC, Inc. The articles specified perpetual life and authorized issuance of 200 shares of stock with a provision for the issuance of more."

"In the early 1960s, Smith presented O'Hair and Jackson, on separate occasions, with stock interests in TSC, Inc. because

of the work they had done for his company and the atheist movement in general. However, no evidence of stock ownership resulting from these transfers survives. O'Hair was never issued a stock certificate although there is no evidence that a stock certificate was not issued [to her] and held by Smith. Jackson claims that his stock certificates were either lost during a move or thrown away because he thought they had no pecuniary value. Furthermore, at the time she was given a stock interest, O'Hair was asked to take over the publication of The Truth Seeker, which she declined to do."

"Charles Smith died in 1964. Prior to his death, Smith moved to San Diego, California and there joined up with Johnson. After Smith's death Johnson, acting as president of TSC, Inc., continued to publish the magazine although it remains unclear as to how Johnson came into possession of the corporate structure. No evidence was presented at trial of Johnson's ownership or inheritance of TSC, Inc. In 1981, 1983 and 1984 O'Hair requested that Johnson relinquish management and control of TSC, Inc. and its publication. Johnson refused.

Meanwhile, under his stewardship, The Truth Seeker's subscribers list dwindled from 25,000-30,000 to 200-400 subscribers by 1987."

"Nineteen eighty-seven was a busy year in this saga. O'Hair felt particular urgency in taking over The Truth Seeker for the benefit of the atheist movement because she was worried about Johnson's advanced age and poor health and the drastic decline in subscriptions. Besides these concerns, O'Hair was further troubled because she had recently learned that Johnson's will left all his property in an open-ended trust to be administered by Lawrence Y. True, a non-atheist. O'Hair enlisted Stephen B. Thorne and Robin Shelley to assist Johnson in publication of the The Truth Seeker as well as to obtain evidence of wrongdoing by Johnson in the conduct of TSC, Inc. and its sister non-profit organizations, American Association for Advancement of Atheism and The National Liberal League. It paid off because Thorne observed Johnson commingling funds from these organizations with his own. He apprised O'Hair of the commingling."

"Additionally, in the summer of 1987, O'Hair regularly noticed a meeting of shareholders and other atheist "regulars" and "old-timers" interested in The Truth Seeker. A notice of the meeting was sent personally to Johnson; he did not attend. The meeting was held in Austin, Texas, the situs of O'Hair's offices and of a new corporation named Truth Seeker of Austin, Inc. ("TSA, Inc."). At this meeting O'Hair was elected to office by the persons present."

"From June 1988 to September 1989 O'Hair distributed, without charge to anyone, a series of three newsletters, appropriately titled The Truth Seeker Newsletter, detailing publicly her efforts to re-start a viable atheist publication, Johnson's activities at TSC, Inc. and the progress of the lawsuits concerning Johnson and the defendants in both cases. Moreover, O'Hair attempted to freeze TSC, Inc.'s assets pending resolution of the litigation then in progress and in contemplation of future litigation to determine corporate ownership. In her capacity as an officer of TSA, Inc., she presented a corporate resolution to the bank and post-office to

re-route TSC, Inc. mail to a post office box under Thorne's control in Escondido, California. No TSC, Inc. funds were ever withdrawn nor did any damage result to Johnson or the corporation from these actions."

"Furthermore, in early 1987 O'Hair first learned that Jackson had also received a stock interest from Smith in TSC, Inc. After O'Hair informed Jackson of Johnson's misconduct which Thorne had reported, O'Hair and Jackson decided to obtain the advice of a lawyer, John W. Vinson, who was in the employ of O'Hairs companies in Texas. They were advised by Vinson that he had researched the matter and that Jackson could file a stockholder's suit in California to require an accounting by Johnson of TSC, Inc. activities. Jackson took the attorney's advice."

[Appendix B, pp. 9a, to 12a.]

III. District Court's Rulings As To Petitioners' Failure To Prove Case:

On November 23, 1994, the District Court ruled that Petitioners

failed to prove their case. The District Court enumerated particulars in which Petitioners failed to present evidence as to material facts; the specifics are quoted here verbatim:

"1. That American Atheist G.H.Q., Inc., aka American Atheist Center, a Texas corporation; The Society of Separationists, Inc., a Maryland corporation; American Atheist, Inc., a Texas corporation; Charles E. Stevens American Atheist Library and Archives, Inc., a Texas corporation; American Atheist Press, Inc., aka Gustav Broukal Press, a Texas corporation; United World Atheists, Inc., a Texas corporation are the alter egos of any of the defendants;

2. That the corporations listed in paragraph one were aware of activities of Jackson or O'Hair in bringing the Jackson case until Johnson's counterclaim was filed in 1988;

3. That any of the corporate defendants had any knowledge of TSA, Inc. activity until after the counterclaim was filed in 1988;

4. That defendants Robin Murray-O'Hair, John Garth Murray, or the corporate defendants ever authorized or ratified any attempt to take-over TSC, Inc.;

5. That any person was confused or likely to be confused as to the source of the San Diego-issued The Truth Seeker and the Austin-issued The Truth Seeker Newsletter;

6. That any act performed by any defendant was done for any fraudulent purpose;

7. That any defendant gained any profit by reason of any act performed during the relevant period encompassed by these cases;

8. That any defendant acted with any motive or ill will toward plaintiffs;

9. That the amounts incurred and paid as attorneys' fees by plaintiffs were reasonable or necessary to the prosecution of these actions; the inference is to the contrary that these fees are in fact exorbitant;

10. That they suffered any damage resulting from the

defendants' alleged conduct underlying either the Johnson or True cases."

[Appendix B, pp. 16a - 17a.]

In the November 23, 1994, ruling, the District Court further concluded that,

> "At trial, this failure of proof equates to a verdict for the defendants. If treated as the defendants' motion for summary judgment, this court is required to grant the motion. '[S]ince a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial[,] [t]he moving party is "entitled to a judgment as a matter of law."' Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)."
>
> [Appendix B, p. 17a.]

IV. Appellate Court's Rulings Affirming The District Court:

After the issues raised on appeal were fully briefed and argued,

on December 31, 1996, the Court of Appeals for the Ninth Circuit entered its ruling. The Appellate Court agreed with the District Court's conclusion "that the uncontroverted facts that [Petitioners] raise again on appeal are not helpful to [Petitioners'] case and are not indicative of material facts in existence." [Appendix A, p. 5a]

The Court of Appeals further concluded that:

> "...because the [Petitioners] presented no evidence of the reasonableness of the attorneys' fees claimed as damages, we hold that the district court properly granted summary judgment in favor of the [Respondents]. While [Petitioners] did offer evidence that attorneys' fees were incurred and paid, they point to nothing in the record supporting the reasonableness of the fees. Fed.R.Civ.P. 56. On the single occasion when [Petitioners] attempted to introduce evidence of the reasonableness of the fees, the court properly sustained the [Respondents'] objection. (The question was obviously leading.) RT Vol. II at 339. Because the district court properly granted summary judgment in

favor of the [Respondents], ..."

[Appendix A, p. 6a.]

REASONS FOR DENYING THE WRIT OF CERTIORARI

I.

Counsel Filing The Petition Does Not Have A Client To Represent, As Petitioner Lawrence Y. True Died On May 14, 1996; Therefore The Petition For Writ Of Certiorari Should Be Rejected In Its Entirety.

Mr. Lawrence Y. True brought the underlying action against Respondents as an individual, and also as the trustee and self-proclaimed sole owner/president of the The Truth Seeker, Inc. corporation[7].

Over six months before the Ninth Circuit Court of Appeals

---

7. Respondents challenged Mr. True's standing to bring an action against Respondents on behalf of the The Truth Seeker corporation. Nevertheless, while not relying upon Petitioners standing for making its ruling that Petitioners failed to prove their prima facie case, the District Court also stated:

> If, as a matter of law, the lack of written evidence establishing stock ownership was fatal to Jackson's lawsuit so it must likewise be fatal to Johnson's and True's standing to claim ownership in TSC, Inc. or a proprietary interest in The Truth Seeker. [Appendix B, p. 16a]

issued its order affirming the District Court's ruling, Mr. True passed away; specifically, on May 14, 1996, Mr. Lawrence Y. True died from cancer at the age of 73[8]. Although it is nearly seventeen months after Mr. True's death, Respondents have yet to be served with a notice of party substitution for Mr. True, or for Mr. True as the trustee and alleged sole owner/president of The Truth Seeker, Inc. corporation. Consequently, it is unclear who Petitioners' counsel, Mr. Roy R. Withers, is claiming to represent for his petition for writ of certiorari. It would seem that Mr. Withers has been engaged in an adventure - a frolic - of his own, unchecked and unbidden by any client.

Therefore, as it is unclear who actually has standing to seek this Court's grant of a petition for writ of certiorari, the petition should be rejected in its entirety.

//

//

//

---

8. Respondents have attached to this Opposition's Appendices as Appendix K, p.41a, a true and correct copy of Mr. True's death certificate from the County of San Diego.

II.

Petitioners Have Failed To Offer Any Compelling Reason Either For This Court To Review And Reverse The Lower Courts' Factual Determinations/Conclusions Of Law, Or Why This Court Should Entertain Questions Not Raised To The Appellate Court.

Petitioners have filed their petition for writ by certiorari, claiming to invoke this Court's jurisdictional powers pursuant to 28 U.S.C. §1254(1). Petitioners appear to believe that review of writ of certiorari is a matter of right, versus an exercise of the Supreme Court's judicial discretion.

1. **Issues Not Raised To Appellate Court:**

The Supreme Court has adopted a general rule that provides that the Supreme Court will not ordinarily consider issues which are neither previously raised by a party seeking review, nor considered by the United States Court of Appeals. Adickes v. S. H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598 (1970). In the present petition, Petitioners seek this Court's reversal based upon three separate questions presented. However, Petitioners' second and third questions presented were not

raised before the Court of Appeals for the Ninth Circuit, nor were they considered by that court. While the Supreme Court has recognized deviations from the general rule, it has held that in only exceptional cases will the Court review a question not raised in the lower court, see Lawn v. United States, 355 U.S. 339,78 S.Ct. 311 (1958), reh den, 355 U.S. 967, 78 S.Ct. 529. Petitioners have failed to make any showing that this case is somehow exceptional. Consequently, the general rule should apply and the second and third questions presented should be disregarded and not considered by this Court.

2. **No Compelling Reason Provided To Invoke This Court's Grant Of The Petition**

Petitioners have also failed to adequately state one compelling reason that would justify this Court's review of the three questions presented, a review of the lower courts' factual findings, and reversal of the lower courts' rulings. Rule 10 of the Rules of the Supreme Court provides clear guidance as to some of the criteria this Court uses in its

determination to exercise its discretion[9]. Nevertheless, upon even a cursory examination, Petitioners' asserted questions fail to conform to any one of the reasons set forth in Rule 10 (a) through (c). Nowhere do Petitioners make a showing:

(1) that the Appellate Court has entered a decision in conflict with the decision of another United States court of appeals on the same important matter;

(2) that the Appellate Court has decided an important federal question in a way that conflicts with a decision by a state court of last resort; and/or

(3) that the Appellate Court has departed from the accepted and usual course of judicial proceedings, or sanctioned a departure by a lower court.

Finally, Rule 10 expressly states that a "petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." While Petitioners have attempted to formulate and slant their questions

---

9. Respondents have reprinted Rule 10 of the Rules of the Supreme Court in Appendix E, p. 34a.

in "error of law" vocabulary, Petitioners are essentially seeking a review of the District Court's and Court of Appeal's separate, but shared, conclusions of factual finding. Both lower courts held that Petitioners failed to introduce sufficient factual evidence to support their claims against Respondents. In fact, both lower courts determined that the evidence submitted by Petitioners in support of their allegations actually detracted from Petitioners' claims.

Petitioners simply were not entitled to damages for causes of action they could not prove. Accordingly, they have failed to adequately state any compelling reason why the Supreme Court should exercise its discretion to review this case. Consequently, Petitioners' petition for writ of certiorari should be rejected.

//

//

//

//

//

III.

Petitioners' Claims Are Misguided Because The Ruling Of The Appellate Court Simply Affirmed The District Court's Holding That Petitioners' Failed To Prove A Prima Facie Case During the Trial; Therefore, Since No Material Issues Were Shown To Exist, Summary Judgment Was Indeed Appropriate.

Summary judgment is properly granted where the court finds that there are no genuine issues as to any material fact and the moving party is entitled to judgment on undisputed facts and the correct application of the law. Fed.R.Civ.P. 56(c)[10]. Rule 56(c) does not require that there be no factual dispute at all: "[b]y its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Paragon Podiatry Laboratory v. KLM Laboratories, 984 F.2d 1182, 1184-85 (Fed. Cir. 1993; see also

---

10. Respondents set forth Federal Rule of Civil Procedure's Rule 56 (c) in its entirety in Appendix J, p. 40a.

Hanon v. Dataproducts Corporation, 976 F.2d 497 (9th Cir. 1992).

The mere disagreement about a material issue of fact is not in itself sufficient to preclude an award of summary judgment. Jackson v. Bank of Hawaii, 902 F.2d 1385, 1389 (9th Cir. 1990). If the factual context makes the non-moving party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial. Id. Furthermore, the district courts "possess the power to enter summary judgment sua sponte, so long as the losing party was on notice that she had to come forward with all of her evidence." Celotex Corp. v. Catrett, 477 U.S. 317, 326, 106 S.Ct. 2548 (1986). The only limitation is that the party against whom summary judgment is entered must have "a full and fair opportunity to develop and present facts and legal arguments in support of [its] position." Portsmouth Square v. Shareholders Protective Comm., 770 F.2d 866, 869 (9th Cir. 1985).

Petitioners claim that the Appellate Court ruling is reversible on the basis that the Appellate Court has increased the evidentiary requirement for a summary judgment determination is devoid of subtance or merit. Petitioners would like to have the ruling reviewed as

though it were simply the result of a summary judgment hearing, without any evidentiary submissions having been considered. However, Petitioners ignore the fact that the Appellate Court affirmed the District Court's holding that Petitioners failed to submit adequate evidence of their allegations at trial. Since Petitioners had a full and fair opportunity to develop and present facts and legal arguments during the four day non-jury trial, there was no reversable error by the District Court making the factual determination that Petitioners failed to substantiate their claims. Nor was it reversable error for the District Court to conclude that no material issues of fact remained to support any claims for damages, and that summary judgment was indeed appropriate.

IV.

The Petition For Writ of Certiorari Should Be Rejected Because During The Trial Petitioners Failed To Submit Any Evidence Of the Reasonableness Of Their Damages And Now Misstate The Law Concerning Such Evidentiary Requirements.

Petitioners claim Mr. True gave testimony at trial "that

$382,683.50[11] was incurred in the defense of the malicious action brought by defendants, and subsequently paid, [this] established a prima facie showing of damages." [Petition for Writ of Certiorari, p. 17] In support of Petitioners position, they rely heavily upon the case of Stevens v. Chisholm, 179 Cal. 557, 178 P. 128 (1919). However, Petitioners have selectively quoted and misapplied the California Supreme Court's general statement regarding a prima facie showing of reasonableness. The California Supreme Court in Stevens stated, "When it does not appear that the attorneys' fees and other expenses are obviously excessive, testimony of the amounts paid will constitute a prima facie case; and it will be assumed in such case that the attorneys' fees so paid were reasonable, unless the contrary appears.[emphasis added to portion not quoted by Petitioners]" Id. at 564. With regard to attorney fees and costs, the Stevens court further stated,

> "... damage to the plaintiff therefore is the amount which

---

11. Mr. True was only able to state a total figure by reading the total dollar amount from a piece of paper, which was hidden in his pocket, and taken out to respond to his attorney's questions. After the slip of paper was revealed to the trial judge, and after Mr. True was not allowed to simply parrot the amounts, Mr. True was not able to give testimony as to the exact amount of legal fees and costs incurred. Upon questioning, Mr. True was only able to testify to an amount "over $300,000." [See, Appendix D, p. 28a to 33a.]

he has been compelled to expend or incur in his defense, but he can only recover such part thereof as constitutes a necessary and reasonable charge; the latter question being one to be determined from the evidence. [emphasis added]" Id. at 564.

Petitioners never introduced any evidence during the trial which provided proof of any payment of attorney fees and/or costs; no evidence of cancelled checks, bills, or accounting records were ever offered, submitted, or testified about. In fact, Petitioners offered absolutely no evidence as to the number of hours billed, what services were actually rendered, or any breakdown as to what constituted the "over $300,000" dollar figure. Consequently, the Appellate Court expressly noted that Petitioners "point[ed] to nothing in the record supporting the reasonableness of the fees." [Appendix A, p. 6a.]

Now, in support of their claim that Petitioners attempted to submit evidence of the reasonableness of the claimed attorney fees, Petitioners have quoted an excerpt from Ms. Madalyn Murray O'Hair's

examination testimony[12]. First, it seems illogical for Petitioners to claim to have tried to show the "reasonableness" of their attorney fees by the testimony of defendant O'Hair; the question begs to be asked: "How could Ms. O'Hair, called by Petitioners as a hostile witness, testify to the reasonableness of the Petitioners' incurred attorneys' fees?"

Second, Petitioners make another fatal leap in logic. At the time Ms. O'Hair was testifying, Petitioners had not provided any evidence as to the total amount of attorney fees, or to the amount paid for their attorneys' services. Thus, the District Court made the statement,

> "No. You tell me what the attorneys' fees are and they will then answer it, yes or no, on big or little. Up till now there has been no attack on it."
>
> [RT Volume II at 190, Lines 14-15]

Nevertheless, Petitioners have hurdled to the conclusion that "[a]ny evidence from Plaintiffs, on the issue of reasonableness, would not be entertained by the District Court, as such evidence was deemed

---

12. Respondents must point out that Petitioners failed to raise this evidence in support of their appeal. Now, Petitioners again try to raise new evidence and issues before this Court. Consequently, the petition should be rejected as Petitioners' new evidence simply does not rise to the level of an exception to the general rule discussed in Section II of Respondents' Reasons For Denying The Writ of Certiorari.

irrelevant until damages were challenged by the Defendants." [Petition, p. 17]

Furthermore, this conclusion ignores that fact that the District Court made its own inquiry into the reasonableness of the damages claimed to have been suffered by Petitioners. Shortly after Ms. O'Hair testified, Petitioners offered the testimony of Mr. Lawrence True.[13] In Petitioners one and only attempt to offer testimony as to the reasonableness of the attorneys' fees, the question asked was objected to, and sustained by the trial judge, as being leading. Moreover, the witness was incompetent on the subject. Instead of rephrasing the question, Petitioner's counsel abruptly halted his questioning. After the cross-examination, the Trial Judge sought specific information from Mr. True as to the nature and reasonableness of the "over $300,000" claimed as damages, yet, Mr. True was unable to provide the specific information requested and made absolutely no showing of reasonableness.

Finally, Petitioners state that,

---

13. Respondents have included pertinent excerpts from Mr. Lawrence Y. True's examination in Appendix D, pp. 28a to 33a, of this Opposition's Appendix.

"Even if it were argued that the fees were obviously excessive, the argument assumes that there is an amount which is not excessive. The question and material trial issue would be what is the reasonable value for the services rendered by the attorneys in the defense of the malicious action." [Petition, p. 17]

Again, Petitioners fail to acknowledge that they had a full and fair opportunity to present their evidence during a four-day trial. Petitioners had their trial, yet no material issue as to damages was found to exist by the District Court. Further, Petitioners also fail to accept the fact that they failed to submit sufficient evidence as to any of their underlying claims even to give rise to the issue of whether the damages they incurred were reasonable. For example, Petitioners never adequately supported their claims that the action brought against them by Respondents was initiated with any sort of malice.

Thus, Petitioners' presented questions of:

(1) whether summary judgment was appropriate, even though there was no showing that damages were reasonable or necessary,

(2) whether the damages of attorneys' fees should have been determined by the trial judge without the introduction of any evidence of reasonableness at trial, and

(3) whether nominal damages could have been given by the trial judge,

have become immaterial issues. Petitioners are essentially asking this Court to review and reverse both lower courts' factual determinations and legal determination that Petitioners did not meet their burden of proof on each cause of action. Therefore, no award of damages was necessary or appropriate.

CONCLUSION

Procedurally, Petitioners' petition should be rejected because by review of the death of Lawrence Y. True, Petitioners are not properly before this Court.

Substantively, Petitioners base their petition for writ of certiorari on faulty and misguided assertions. Petitioners claim that the District Court overstepped its discretionary power: (1) by allegedly increasing the evidentiary requirements on the issue of damages during a summary

judgment; (2) by not assessing the reasonableness of attorney fees when no evidence of the reasonableness of attorney fees was introduced by Petitioners at trial; and, (3) by the District Court not awarding nominal damages to Petitioners.

First, the petition for writ of certiorari should be rejected because the Petitioners' fail to recognize that a party to suit is not entitled to damages unless the party claiming injury meets his or her burden of proof on all elements to at least one cause of action. In this case, both the District Court and the Appellate Court determined that, despite the fact that Petitioners had every opportunity to introduce evidence to support their claims during a non-jury trial, Petitioners failed to prove a prima facie case as to even one cause of action. Therefore, any issue of whether damages and/or attorney fees were reasonable, or whether the District Court should have awarded nominal damages, immediately became an immaterial issue and properly subject to dismissal pursuant to F.R.C.P. 56.

Second, the petition for writ of certiorari should be rejected because Petitioners never raised, during Petitioners' appeal to the Ninth Circuit Court of Appeals, the issues they now advance. Petitioners are

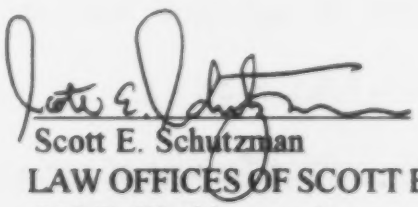
requesting review of never-before-raised questions, despite the Supreme Court's general rule of rejecting issues previously not raised.

Third, the petition for writ of certiorari should be rejected because the Ninth Circuit Opinion presents no danger of disturbance of precedent. There is simply no likelihood for any "future confusion" as argued by Petitioners, because the Appellate Court specifically stated that the disposition was not appropriate for publication and was not to be cited. [see, Appendix A, p. 3a, Fn. (*)]

Finally, the Court is asked to find Petitioners' petition frivolous under Rule 42 of the U.S. Supreme Court Rules and assess appropriate sanctions.

WHEREFORE, as no good reason appears to grant certiorari, the petition should be denied.

Respectfully submitted,



Scott E. Schutzman
LAW OFFICES OF SCOTT E. SCHUTZMAN
219 E. Washington Ave.
Santa Ana, CA 92701
(714) 543-3638

APPENDIX A

NOT FOR PUBLICATION
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Filed, December 31, 1996

JOHN G. JACKSON, et al.,	)	Nos.: 95-55310
	)	95-55501
Plaintiffs,	)	
	)	D.C. No. CV 87-01441
v.	)	Lead Docket
	)	
THE TRUTH SEEKER COMPANY, INC., THE ESTATE OF JAMES HERVEY JOHNSON, et al.,	)	
	)	
Defendants,	)	
	)	
THE ESTATE OF JAMES HERVEY JOHNSON, and THE TRUTH CO., INC., a New York corporation,	)	
	)	
Counter-Claimants Appellants,	)	
	)	
v.	)	
	)	
JOHN G. JACKSON, et al.,	)	
	)	
Counter-Defendants Appellees,	)	
	)	
LAWRENCE TRUE, Trustee of the James Hervey Johnson Charitable Educational Trust and the Truth Seeker Trust; and the THE	)	D.C. No. CV 91-00494-MR

TRUTH SEEKER COMPANY, INC.,

Plaintiffs-Counter-Claimants-Appellants

v.

JOHN G. JACKSON, et al.

Defendants/Counter-Defendants-Appellees,

JOHN G. JACKSON, et al.,

Plaintiffs,

v.

THE TRUTH SEEKER COMPANY, INC.; THE ESTATE OF JAMES HERVEY JOHNSON, et al.,

Defendants,

THE ESTATE OF JAMES HERVEY JOHNSON, and THE TRUTH CO., INC., a New York corporation,

Counter-Claimants Appellees,

v.

JOHN G. JACKSON, et al.,

Counter-Defendants

and

No. 95-55589

D.C. No. CV 87-1441-MR

MADALYN MURRAY O'HAIR, et al.,	)	
Defendants Counter-Defendants Appellants.	)	
LAWRENCE TRUE, Trustee of the James Hervey Johnson Charitable Educational Trust and the Truth Seeker Trust; and the THE TRUTH SEEKER COMPANY, INC.,	)	D.C. No. CV 91-00494-MR
Plaintiffs-Counter-Claimants-Appellees,	)	
v.	)	
JOHN G. JACKSON, a private individual,	)	
Defendant/Counter-Defendant	)	
and	)	
MADALYN MURRAY O'HAIR, et al.,	)	
Defendants/Counter-Defendants-Appellants.	)	MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California

* This Disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Manual L. Real, District Judge, Presiding

Argued and Submitted April 9, 1996
Pasadena, California

Before: SCHROEDER and LEAVY, Circuit Judges, and TRIMBLE,** District Judge

Plaintiffs appeal the district court's denial of their request for a jury trial in their unfair competition, trademark, tradename infringement, Lanham Act, and RICO action (also known as the "*Johnson* action") and malicious prosecution action (the True action). Plaintiffs also appeal from the district court's judgment in favor of the defendants on the substantive claims because uncontroverted evidence was presented by plaintiffs as to material facts in existence. Appeals Nos. 95-55501 and 95-5310. Defendants appeal the district court decisions denying attorneys' fees and sanctions and calculating the amount of costs taxed for defendants pursuant to Rule 54(d) of the Federal Rules of Civil Procedure. Appeal No. 95-55589.

The right to a jury trial in a civil case is granted by either the United States Constitution, a state constitution, or a statute that creates a cause of action different from that of the common law. Neither party has pointed to any statutory or state constitutional right that guarantees plaintiffs a jury trial for the recovery of attorneys' fees. Therefore, the right to a jury trial in this matter is

---

** The Honorable James T. Trimble, Jr., United States District Judge for the Western District of Louisiana, sitting by designation.

grounded in the U.S. Constitution and in federal law. *Simler v. Conner*, 371 U.S. 221, 222 (1963). The Seventh Amendment of the U.S. Constitution provides that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved...."

With respect to the district court's decision to strike the jury trial in the *Johnson* action, plaintiffs failed to prove damages in excess of twenty dollars. Although plaintiffs argue that various monies were involved that exceeded twenty dollars, this court agrees with the district court's findings that any such monies were contributions to a legal defense fund that could not be considered a part of plaintiffs' damages. This court also agrees with the lower court decision that the uncontroverted facts that plaintiffs raise again on appeal are not helpful to plaintiffs' case and are not indicative of material facts in existence.

This court, however, disagrees with the district court's decision to strike the jury trial in the malicious prosecution action because plaintiffs alleged damages in excess of twenty dollars resulting from attorneys' fees spent in the underlying suit. In *Bertero v. National General Corp.*, 118 Cal.Rptr. 184 (Cal. 1976), the California Supreme Court acknowledged that attorneys' fees incurred in defending against an underlying action could be claimed as damages in a later malicious prosecution action, stating:

> The malicious commencement of civil proceeding is actionable because it harms the individual against whom the claim is made, and also because it threatens the efficient administration of justice. The individual is harmed

> because he is compelled to defend against a fabricated claim which not only subjects him to the panoply of psychological pressures most civil defendants suffer, but also to the additional stress of attempting to resist a suit commenced out of spite or ill will, often magnified by slanderous allegations in the pleadings. ***In recognition of the wrong done the victim of such tort, settled law permits him to recover the cost of defending the prior action including reasonable attorney's fees.***

Id. at 190 (citations omitted and emphasis added).

Similarly, in a case involving a claim of malicious prosecution with respect to a civil claim, the court in *Von Brimer v. Whirlpool Corp.*, 536 F. 2d 838 (9th Cir. 1976), stated that :

> The range of damages potentially recoverable in a malicious prosecution action in California is strikingly broad. Damages may be recovered for loss of time, deprivation of liberty, injury to fame, reputation, character, social or mercantile standing, mental suffering, injury to credit, and ***for sums expended in defending the unfounded lawsuit.***

Id. at 847 (citations omitted and emphasis added).

Nevertheless, because the plaintiffs presented no evidence of the reasonableness of the attorneys' fees claimed as damages, we hold that the district court properly granted summary judgment in favor of the defendants. While plaintiffs did offer evidence that attorneys' fees were incurred and paid, they point to nothing in the record supporting the reasonableness of the fees. Fed.R. Civ. P. 56. On the single occasion when plaintiffs attempted to introduce evidence of the reasonableness of the fees, the court properly sustained the defendants' objection. (The question was obviously leading.) RT Vol. II at 339.

Because the district court properly granted summary judgment in favor of the defendants, the issue of a jury trial became moot.

Finally, this court is asked to address whether the district court erred in denying defendants' requests for attorneys' fees and sanctions and miscalculated the amount of costs taxed for defendants. Defendants, however, have failed to provide a sufficient showing that the district court abused its discretion in denying an award of attorneys' fees and sanctions. Furthermore, this court sees no error in the district court's calculation of the amount of costs taxed in this matter.

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Filed November 21, 1994

JOHN G. JACKSON, et al.,	) Case No.: 87-1441-K (LSP)
	) 91-0494-K (LSP)
Plaintiffs,	)
	)
vs.	) OPINION
	)
THE TRUTH SEEKER COMPANY, INC., et al.,	)
	)
Defendants,	)
	)
AND RELATED COUNTERCLAIM	)
	)
LAWRENCE TRUE, Trustee of the James Hervey Johnson Charitable Educational Trust and the Truth Seeker Trust; and the THE TRUTH SEEKER COMPANY, INC.,	)
	)
Plaintiffs,	)
	)
vs.	)
	)
JOHN G. JACKSON, a private individual; et al.	)
	)
Defendants.	)

//

OPINION AND ORDER

The court held a non-jury trial concurrent with a hearing to determine whether there were any material facts in dispute on defendants' Rule 12 (b) motion which was being considered as a motion for summary judgment. For the reasons stated below, the court ordered judgment in favor of the defendants.

I. FACTUAL BACKGROUND

This matter involves two law suits and a counterclaim. These three cases essentially boil down to a controversy between John G. Jackson and Madalyn O'Hair on one side and James Hervey Johnson on the other. The dispute concerns the promulgation of atheist ideology and the survival of Truth Seeker Company, Inc. ("TSC, Inc.") and The Truth Seeker, the publication established to spread atheist doctrine throughout the English speaking world. These matters are complicated only in the sense that parties who were, at best, observers of the Jackson-O'Hair-Johnson dispute were caught in the elaborate web of Johnson's counterclaims. A brief history of TSC, Inc. and the key players in these cases will go a long way in unraveling the confusion.

The Truth Seeker magazine was initiated in 1873. In 1940, one Charles Smith took over operation of the The Truth Seeker and filed articles of incorporation in New York, thus Creating TSC, Inc. The articles specified perpetual life and authorized issuance of 200 shares of stock with a provision for the issuance of more.

In the early 1960s, Smith presented O'Hair an Jackson, on separate occasions, with stock interests in TSC, Inc. because of the work they had done for his company and the atheist movement in general.* However, no evidence of stock ownership resulting from these transfers survives. O'Hair was never issued a stock certificate although there is no evidence that a stock certificate was not issued and held by Smith. Jackson claims that his stock certificates were either lost during a move or thrown away because he thought they had no pecuniary value. Furthermore, at the time she was given a stock interest, O'Hair was asked to take over the publication of The Truth Seeker, which she declined to do.

Charles Smith died in 1964. Prior to his death, Smith moved to San Diego, California and there joined up with Johnson. After Smith's death Johnson, acting as president of TSC, Inc., continued to publish the magazine although it remains unclear as to how Johnson came into possession of the corporate structure. No evidence was presented at trial of Johnson's ownership or inheritance of TSC, Inc. In 1981, 1983 and 1984 O'Hair requested that Johnson relinquish management and control of TSC, Inc. and its publication. Johnson refused. Meanwhile, under his stewardship, The Truth Seeker's

---

1. Notably, Smith was grateful to O'Hair for having won a significant victory for the atheist movement in the United States Supreme Court case School District of Abington Township v. Schempp, 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963).

subscribers list dwindled from 25,000-30,000 to 200-400 subscribers by 1987.

Nineteen eighty-seven was a busy year in this saga. O'Hair felt particular urgency in taking over The Truth Seeker for the benefit of the atheist movement because she was worried about Johnson's advanced age and poor health and the drastic decline in subscriptions. Besides these concerns, O'Hair was further troubled because she had recently learned that Johnson's will left all his property in an open-ended trust to be administered by Lawrence Y. True, a non-atheist. O'Hair enlisted Stephen B. Thorne and Robin Shelley to assist Johnson in publication of the The Truth Seeker as well as to obtain evidence of wrongdoing by Johnson in the conduct of TSC, Inc. and its sister non-profit organizations, American Association for Advancement of Atheism and The National Liberal League.[2] It paid off because Thorne observed Johnson commingling funds from these organizations with his own. He apprised O'Hair of the commingling.

Additionally, in the summer of 1987, O'Hair regularly noticed a meeting of shareholders and other atheist "regulars" and "old-timers" interested in The Truth Seeker. A notice of the meeting was sent personally to Johnson; he did not attend. The meeting was held in Austin, Texas, the situs of O'Hair's offices and of a new corporation named Truth Seeker of Austin, Inc. ("TSA, Inc."). At

---

2. Johnson was allegedly the president of these not-for-profit corporations.

this meeting O'Hair was elected to office by the persons present.

From June 1988 to September 1989 O'Hair distributed, without charge to anyone, a series of three newsletters, appropriately titled The Truth Seeker Newsletter, detailing publicly her efforts to re-start a viable atheist publication, Johnson's activities at TSC, Inc. and the progress of the lawsuits concerning Johnson and the defendants in both cases. Moreover, O'Hair attempted to freeze TSC, Inc.'s assets pending resolution of the litigation then in progress and in contemplation of future litigation to determine corporate ownership. In her capacity as an officer of TSA, Inc., she presented a corporate resolution to the bank and post-office to re-route TSC, Inc. mail to a post office box under Thorne's control in Escondido, California. No TSC, Inc. funds were ever withdrawn nor did any damage result to Johnson or the corporation from these actions.

Furthermore, in early 1987 O'Hair first learned that Jackson had also received a stock interest from Smith in TSC, Inc. After O'Hair informed Jackson of Johnson's misconduct which Thorne had reported, O'Hair and Jackson decided to obtain the advice of a lawyer, John W. Vinson, who was in the employ of O'Hairs companies in Texas. They were advised by Vinson that he had researched the matter and that Jackson could file a stockholder's suit in California to require an accounting by Johnson of TSC, Inc. activities. Jackson took the attorney's advice.

II. PROCEDURAL HISTORY

In October 1987, Jackson, as a shareholder of TSC, Inc., instituted the first law suit against defendants TSC, Inc., James Hervey Johnson[3], and the two not-for-profit corporations, American Association for Advancement of Atheism and The National Liberal League [hereinafter "the Jackson case"]. Alleging that Johnson commingled TSC money with his own, misappropriated funds into his personal accounts and generally mismanaged the accounts and the book distribution business of TSC, Inc., Jackson sought an accounting and other relief concerning the operation of TSC, Inc.

On this underlying action, the Estate filed a counterclaim for itself and TSC, Inc. against several defendants, the most important for the purposes of this opinion being Jackson and O'Hair[4] [hereinafter "the Johnson case"]. The counterclaim was brought for (1) conversion; (2) trademark/tradename infringement; (3) conversion and infringement of common law rights; (4) violation of the Lanham Act (15 USC §1225(a)); (5) RICO (18 USC §1962(b));

---

3. James Hervey Johnson was the originally named defendant. On August 6, 1988 Johnson died and his estate took his place in the law suit.

4. The other defendants are Jon Garth Murray, Robin Murray O'Hair, Arnold Via, Robin Shelley, all individuals, and American Atheist G.H.Q., Inc. aka America Atheist Center, a Texas corporation; The Society of Separationists, Inc., a Maryland corporation; American Atheist, Inc., a Texas corporation; Charles E. Stevens American Atheist Library and Archives, Inc., a Texas corporation; American Atheist Press, Inc., aka Gustav Broukal Press, a Texas corporation; United World Atheists, Inc., a Texas corporation. During the pendency of the Jackson case, the counterclaimants dismissed defendants Via, Thorne and Shelly.

(6) conduct of an enterprise involving interstate commerce through a pattern of racketeering activity (18 USC 1962(c)); and (7) conspiracy to violate 18 USC 1962(b) racketeering activity to acquire/maintain interest/control of an enterprise engaged in/affecting interstate commerce.

On April 11, 1991 a second law suit was filed by True, trustee of the James Hervey Johnson Charitable Educational Trust and the Truth Seeker Trust, both created by the will of Johnson [hereinafter "the True case"]. This action was brought for malicious prosecution against Jackson and O'Hair as well as a familiar cast of other defendants.[5]

Subsequently, the Jackson case fell victim to summary judgment because Jackson could not produce the stock certificates he claimed were given to him by Smith. The Johnson case and the True case were consolidated and proceeded as a jury trial. This proceeding ended in a deadlocked jury. A mistrial was declared and the matter then came before me for a new trail.

Defendants moved to have the new trial proceed as a non-jury trial. First, they argued that the evidence at the first trial established that Johnson and

---

5. The defendants are John W. Vinson, attorney of record for the filing of the Jackson case ; American Atheists G.H.Q, Inc., aka American Atheist Center, a Texas corporation; The Society of Separationists, Inc., a Maryland corporation; American Atheist, Inc., a Texas corporation; Charles E. Stevens American Atheist Library and Archives, Inc., a Texas corporation; American Atheist Press, Inc., aka Gustav Broukal Press, a Texas corporation; United World Atheists, Inc., a Texas corporation.

True had not suffered damages of twenty dollars or more, the threshold requirement which triggers the constitutional right to a civil trial by jury as guaranteed by the Seventh Amendment. Second, there was no federal or state statute creating a right to jury trial in an action for conversion, trademark/tradename infringement, malicious prosecution or for violations of the Lanham Act or RICO.

Ruling for the defendants, the court held that Johnson had failed to file a timely jury demand on the counterclaims or present proof of damage of twenty dollars or more in the first trial. The Johnson case was to proceed non-jury. As for the True case, the court found that the evidence showed that the plaintiffs had not suffered a minimum of twenty dollars in damages nor was there a statute providing for a jury trial in a malicious prosection action, and thus were not entitled to a civil jury trial.

On the eve of trial, defendants moved to dismiss all causes of action. Under the circumstances, the court decided that the matters proceed simultaneously on two-tracks -- as a non-jury trial and a hearing to determine whether there were any material facts in dispute on the motion to dismiss which would now be treated as a motion for summary judgment on all claims.

//

//

III. DISCUSSION

A. Substantive Claims

If, as a matter of law, the lack of written evidence establishing stock ownership was fatal to Jackson's lawsuit so it must likewise be fatal to Johnson's and True's standing to claim ownership in TSC, Inc. or a proprietary interest in The Truth Seeker. However, the court need not rely on the issue of standing to find for the defendants in this matter because the plaintiffs simply did not establish their prima facia case. During the non-jury trial/hearing, the plaintiffs failed to present evidence as to the following material facts:

1. That American Atheist G.H.Q., Inc., aka American Atheist Center, a Texas corporation; The Society of Separationists, Inc., a Maryland corporation; American Atheist, Inc., a Texas corporation; Charles E. Stevens American Atheist Library and Archives, Inc., a Texas corporation; American Atheist Press, Inc., aka Gustav Broukal Press, a Texas corporation; United World Atheists, Inc., a Texas corporation are the alter egos of any of the defendants;

2. That the corporations listed in paragraph one were aware of activities of Jackson or O'Hair in bringing the Jackson case until Johnson's counterclaim was filed in 1988;

3. That any of the corporate defendants had any knowledge of TSA, Inc. activity until after the counterclaim was filed in 1988;

4. That defendants Robin Murray-O'Hair, John Garth Murray, or the corporate defendants ever authorized or ratified any attempt to take-over TSC, Inc.;

5. That any person was confused or likely to be confused as to the source of the San Diego-issued The Truth Seeker and the

Austin-issued The Truth Seeker Newsletter;

6. That any act performed by any defendant was done for any fraudulent purpose;

7. That any defendant gained any profit by reason of any act performed during the relevant period encompassed by these cases;

8. That any defendant acted with any motive or ill will toward plaintiffs;

9. That the amounts incurred and paid as attorneys' fees by plaintiffs were reasonable or necessary to the prosecution of these actions; the inference is to the contrary that these fees are in fact exorbitant;

10. That they suffered any damage resulting from the defendants' alleged conduct underlying either the Johnson or True cases.

At trial, this failure of proof equates to a verdict for the defendants. If treated as the defendants' motion for summary judgment, this court is required to grant the motion. "[S]ince a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial[,][t]he moving party is 'entitled to a judgment as a matter of law.'" Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

Moreover, the uncontroverted facts that were presented during this proceeding do not aid the plaintiffs' cases. The facts that O'Hair had been told by Thorne of his witnessing Johnson's commingling and that O'Hair and

Jackson sought and followed the advice of counsel provide the necessary probable cause for bringing the Jackson case. These facts defeat the charge of malicious prosecution. O'Hair and TSA, Inc.'s mere re-routing of TSC, Inc.'s mail does not legally support any claim of mail or wire fraud, which are necessary as predicate acts in a RICO claim. Nor does any of the conduct amount to any illegal action by O'Hair that would give rise to RICO consideration.

Based on the forgoing, it does not matter whether the court treated these proceedings as a non-jury trial or a hearing on defendants' motion to dismiss that the court sua sponte considered as a motion for summary judgment. In either instance, the court would order, and does order, judgment for the defendants.

B. The Jury Issue

The issue on the right to a jury trial in the True case for malicious prosecution was raised by the defendants' motion in limine on the grounds that plaintiffs had neither a constitutional nor statutory right to a civil jury trial. The right to a jury trial in a civil case is conferred by the United States Constitution, by a state constitution or by a statute that creates a cause of action different from the common law. In a malicious prosecution action, there is no statutory right to a jury trial. Absent such a statute, the right to a jury trial in federal court is a matter of federal law. Simler v. Conner, 371 U.S. 221, 222, 9 L. Ed. 2d 691,

693 (1963). Therefore, if these plaintiffs can successfully assert a right to a civil jury trial, it must be grounded in the Seventh Amendment of the United States Constitution.

The Seventh Amendment provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved ...." To maintain that right the controversy must exceed twenty dollars. It is because the plaintiffs' in their first trial failed to prove twenty dollars or more in damages that the court decided to proceed without a jury on the malicious prosecution claim at the second trial.

Malicious prosecution at common law was an action for recovery of damages resulting to a person, a person's property or a person's reputation from an unsuccessful proceeding, either civil or criminal. The testimony at the first trial showed that neither Johnson nor his estate suffered damages resulting from the action filed. At common law attorneys' fees were not recoverable as an element of damages. Stewart v. Snneborn, 98 U.S. 187, 25 L. Ed 116 (1878). Since Johnson offered no evidence of cognizable common-law damage to his person, business or reputation that would meet the constitutional minimum, the case does not qualify under the Seventh Amendment for a jury trial.

As a matter of first impression and perhaps as just a curious incursion into constitutional interpretation, the twenty dollar threshold of the Seventh Amendment right to a jury trial in civil cases ought to be brought into the

imminent reality of the 21st century. The twenty dollar requirement seems lost in its applicability to today's world. A party in a federal question case may demand a jury if the claim exceeds twenty dollars. However, if that same party wants a federal jury to decide the claim in a diversity of citizenship case, perhaps one involving the same conduct, to even get in the door of a federal courthouse the claim must exceed $50,000.

Perhaps the larger issue to be considered is whether or not there is any sanction for construing otherwise clear and unequivocal language in the Constitution to accommodate changes in the historical development of the law. In this instance, is a threshold of twenty dollars part of the constitutional guarantee or is it only a measure of the importance of the matter such that it requires presentation for a jury of so-called peers? Or can this "threshold" be treated merely as an extension of fact finding without a jury under the rubric of equity? See Note, The Right to a Non-Jury Trial, 74 Harv. L. Rev. 1176, 1181 91961).

To justify construction of the Constitution in this manner, the basic question ought to be does a change in the monetary requirement of a jury trial do any violence to the fundamental purpose of a jury trial. The absurdity of requiring six or twelve citizens to sit in judgment of a controversy involving as little as $21 is obvious. Even in the world of strict constructionists vs. activists, there should be little debate that perhaps the twenty dollar threshold is not

essential to the operation of a viable jury system. the twenty dollar threshold cannot be reached in this case, however, under any interpretation of the Seventh Amendment. Therefore, pursuant to Federal Rule of Civil Procedure 39(a)(2), this court finds that these plaintiffs do not have a right to a jury trial.

There is yet another problem in this case. The plaintiffs fully participated in the proceedings. They could have refused to go forward with the non-jury trial. Instead, the plaintiffs chose to present their case in its entirety. Assuming a right to jury trial existed in this case, such conduct has been held to be a waiver of that right. See White v. McGinnis, 903 F.2d 699, 703 (9th Cir. 1990) cert. denied 498 U.S. 903 (1990); Royal American Mgrs., Inc. v. IRC Holding Corp., 885 F.2d 1011, 1018 (2d Cir. 1989); Lovelace v. Dall, 820 F.2d 223, 227-29 (7th Cir. 1987) (per curium); United States v. 1966 Beechcraft Aircraft Model King Air A90 Cream, 777 F.2d 947, 950-51 (4th Cir. 1985); Allen v. Barnes Hosp., 721 F.2d 643, 644 (8th Cir. 1983).

The opinion in White v. McGinnis is instructive. In White, the plaintiff, despite having filed a demand for jury trial, participated in the two-day bench trial. White, 903 F.2d at 703. After losing, the plaintiff complained he had not waived his right to jury trial as set forth by Federal Rule of Civil Procedure 39(a)(1), and thus was denied his constitutional rights. Id. The plaintiff's claim was really an effort to get a second bite at the apple; the court of appeals clearly saw the attempt for what it was.

The Ninth Circuit stated,

> A party's vigorous participation in a bench trial, without so much as a mention of a jury, cannot be presumed the result of mere inadvertence, but can only be ascribed to knowledgeable relinquishment of the prior jury demand. This is especially so where, as here, "the [objecting] party was 'on notice that the trial court was planning to adjudicate the dispositive issues of fact.'"... "[C]ourt judgments should have meaning and effect instead of being a futile exercise that one of the parties will be able to overturn no matter what the result." The appellant chose to argue his case fully before the district judge; it is not unjust to hold him to that commitment.

Id. (citations omitted).

In the True case, the plaintiffs vigorously advocated the matter, from lengthy opening statement to post trial submission of proposed findings of fact and conclusions of law. The record reflects that the plaintiffs were fully apprised that this matter was being heard without a jury, that the proceeding was both a non-jury trial and a hearing on a motion for summary judgment, and the dispositive issues of fact were to be determined by the presiding judge. They could have filed a writ of mandamus or sought an interlocutory appeal to halt the proceedings. But for an objection in order to "make the record," the plaintiffs' conduct clearly indicated they acquiesced to the manner in which the case was to proceed. Therefore, even if the plaintiffs had a right to a jury trial, they have waived that right by their conduct. The estate of James Hervey Johnson had its full day in court.

IV. CONCLUSION

Treating the evidence presented to the court either as a motion for summary judgment determining material facts without controversy or as a trial on the merits judgment shall be for the defendants. Judgment shall be entered accordingly.

Dated: November 16, 1994.

/s/ MANUAL L. REAL
Manual L. Real
UNITED STATES DISTRICT JUDGE

APPENDIX C

NOT FOR PUBLICATION
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Filed. October 7, 1997

JOHN G. JACKSON, et al.,	)	Nos.: 95-55310
	)	95-55501
Plaintiffs,	)	
	)	D.C. No. CV 87-01441
v.	)	Lead Docket
	)	
THE TRUTH SEEKER COMPANY, INC.; THE ESTATE OF JAMES HERVEY JOHNSON, et al.,	)	
	)	
Defendants,	)	
	)	
THE ESTATE OF JAMES HERVEY JOHNSON, and THE TRUTH CO., INC , a New York corporation,	)	
	)	
Counter-Claimants Appellants,	)	
	)	
v	)	
	)	
JOHN G. JACKSON, et al.,	)	
	)	
Counter-Defendants Appellees,	)	
	)	
LAWRENCE TRUE, Trustee of the James Hervey Johnson Charitable Educational Trust and the Truth Seeker Trust; and the THE	)	D.C. No. CV 91-00494-MR

TRUTH SEEKER COMPANY, INC.,

Plaintiffs-Counter-Claimants-Appellants

v.

JOHN G. JACKSON, et al.

Defendants/Counter-Defendants-Appellees,

JOHN G. JACKSON, et al.,

Plaintiffs,

v.

THE TRUTH SEEKER COMPANY, INC.; THE ESTATE OF JAMES HERVEY JOHNSON, et al.,

Defendants.

THE ESTATE OF JAMES HERVEY JOHNSON, and THE TRUTH CO., INC., a New York corporation,

Counter-Claimants Appellees,

v.

JOHN G. JACKSON, et al.,

Counter-Defendants

and

No. 95-55589

D.C. No. CV 87-1441-MR

MADALYN MURRAY O'HAIR, et al.,	)	
Defendants Counter-Defendants Appellants.	)	
LAWRENCE TRUE, Trustee of the James Hervey Johnson Charitable Educational Trust and the Truth Seeker Trust; and the THE TRUTH SEEKER COMPANY, INC.,	)	D.C. No. CV 91-00494-MR
Plaintiffs-Counter-Claimants-Appellees,	)	
v.	)	
JOHN G. JACKSON, a private individual,	)	
Defendant/Counter-Defendant	)	
and	)	
MADALYN MURRAY O'HAIR, et al.,	)	
Defendants/Counter-Defendants-Appellants.	)	ORDER

Before: SCHROEDER and LEAVY, Circuit Judges, and TRIMBLE*, District Judge

* The Honorable James T. Trimble, Jr., United States District Judge for the Western District of Louisiana, sitting by designation.

In light of the bankruptcy court order filed August 19, 1997, this court's order filed june 3, 1997, staying the action against Madalyn E. O'Hair, Jon Garth Murray, and Robin Murray-O'Hair is vacated.

The petition for rehearing is denied. The mandate is to issue forthwith.

APPENDIX D

PERTINENT EXCERPT FROM REPORTER'S TRANSCRIPT, PAGES 338 THROUGH 343, OF LAWRENCE Y. TRUE'S TESTIMONY:

DEPUTY CLERK: PLEASE STATE YOUR NAME FOR THE RECORD.

THE WITNESS: LAWRENCE Y. TRUE, T-R-U-E.

EXAMINATION

BY MR. WITHERS,

Q. MR. TRUE, YOU ARE THE TRUSTEE OF THE JOHNSON CHARITABLE EDUCATION TRUST AND THE TRUTH SEEKER TRUST; IS THAT CORRECT?

A. I AM.

...

Q. AND YOU HAVE HAD OCCASION TO INCUR COSTS AND FEES RELATIVE TO THE LITIGATION THAT HAS BEEN MAINTAINED BY YOU ON BEHALF OF MR. JOHNSON SINCE HIS DEATH; IS THAT TRUE?

A. YES.

Q. IS IT TRUE THAT THE AMOUNTS CLAIMED FOR THE DEFENSE OF THE INITIAL ACTION WAS $382,683.50?

A. YES, IT IS.

Q. IS IT TRUE THAT YOU ARE CLAIMING $535,690.21 ON COUNTERCLAIM?

A. THAT IS CORRECT.

Q. AND IS IT TRUE THAT THE TOTAL AMOUNT YOU CLAIM AS DAMAGES IN THIS ACTION IS $918,392.94?

MR. BOONE: OBJECTION. LEADING

THE COURT: THE OBJECTION IS SUSTAINED.

TO BEGIN WITH, THAT IS NOT A FACT. YOU HAVE ALREADY SET OUT WHAT THE CLAIMS ARE FOR EACH ACTION.

BY MR. WITHERS:

Q. AND, MR. TRUE, YOU HAVE HAD THE OPPORTUNITY TO REVIEW THE REDACTED BILLINGS IN THAT MATTER AND THE FIGURES WE HAVE QUOTED ARE ACCURATE?

A. THEY ARE; AND I HAVE REVIEWED THE BILLS, YES.

Q. AND YOU HAVE HAD EXPERIENCE IN REVIEWING ATTORNEYS' BILLS IN THE PAST; IS THAT CORRECT?

A. I HAVE

Q. AND YOU CONSIDER THOSE SUMS REASONABLE; IS THAT TRUE?

MR. BOONE: OBJECTION, YOUR HONOR.

THE COURT: OBJECTION SUSTAINED.

MR. WITHERS: I HAVE NO FURTHER QUESTIONS, YOU HONOR.

THE COURT: CROSS-EXAMINATION

MR. SCHUTZMAN: I HAVE A COUPLE, YOUR HONOR.

EXAMINATION

BY MR. SCHUTZMAN:

Q. MR. TRUE, I NOTICED YOU PUT A PIECE OF PAPER IN YOUR POCKET RIGHT AFTER MR. WITHERS ASKED YOU QUESTIONS.

...

THE COURT: HE TOOK IT OUT OF HIS POCKET. THE OBJECTION IS OVERRULED.

BY MR. SCHUTZMAN:

Q. MR. TRUE, HOW MUCH MONEY IN DAMAGES DID YOU SAY WAS INCURRED IN THIS PROSECUTION ACTION?

A. PARDON ME?

Q. HOW MUCH MONEY IN DAMAGES DID YOU INCUR IN THE INITIAL JACKSON VERSUS TRUTH SEEKER ACTION?

A. IT'S OVER 300,00.

Q. AND WHAT DO YOU BASE THAT NUMBER ON?

A. WELL, THAT'S THE AMOUNT OF BILLS THAT WERE

INCURRED.

Q. WHAT WERE THOSE BILLS FOR?

A. FOR THE DEFENSE OF THE ORIGINAL ACTION.

Q. ASIDE FROM THE DEFENSE, ASIDE FROM THE ATTORNEYS' FEES AND COSTS IN THE DEFENSE OF THE ORIGINAL ACTION, DID YOU HAVE ANY OTHER DAMAGES THAT WOULD COMPRISE THAT NUMBER?

A. NO.

Q. AND, MR. TRUE, AS FAR AS THE COUNTERCLAIM, DO YOU RECALL THE NUMBER OR THE AMOUNT OF DAMAGES YOU ARE ASKING FOR IN THE COUNTERCLAIM?

A. IT IS ABOUT -- OVER 500,000.

...

THE COURT: MR. TRUE, HOW MUCH PER HOUR WERE YOU PAYING COUNSEL?

THE WITNESS: 150 PER HOUR.

THE COURT: FOR HOW MANY HOURS?

THE WITNESS: I CERTAINLY DON'T REMEMBER HOW MANY HOURS. WHAT DO YOU MEAN, SIR?

THE COURT: WELL, HOW MANY HOURS DID YOU PAY HIM FOR?

THE WITNESS: YOU MEAN OVER THE TOTAL COURSE OF THE --

THE COURT: OF JACKSON VERSUS TRUTH SEEKER.

THE WITNESS: I DON'T KNOW.

THE COURT: HOW MUCH WERE YOU PAYING FOR THE ATTORNEYS' FEES THAT YOU ARE CLAIMING IN THIS ACTION?

THE WITNESS: 150 AN HOUR.

THE COURT: AND HOW MANY HOURS ARE YOU CLAIMING THAT YOU PAID FOR?

THE WITNESS: I DO NOT KNOW. I CAN CERTAINLY FIND OUT. BUT I DON'T CARRY --

THE COURT: I AM ASKING WHAT DO YOU KNOW.

YOU ARE TESTIFYING AS TO YOUR DAMAGE AS A RESULT OF CERTAIN ACTIONS AND I WANT TO KNOW HOW MUCH YOU PAID AND FOR HOW MANY HOURS. THAT IS THE WAY LAWYERS GET PAID.

THE WITNESS: IS THAT THE QUESTION?

THE COURT: YES.

HOW MANY HOURS?

THE WITNESS: I DON'T HAVE THE SLIGHTEST IDEA.

THE COURT: ALL RIGHT

MR. WITHERS: YOUR HONOR, IF I MAY SUBMIT SOMETHING TO THE COURT?

THE COURT: NO. HE HAS TESTIFIED, UNLESS YOU ARE GOING TO BECOME A WITNESS.

APPENDIX E

U.S. SUPREME COURT RULES:

Rule 10. Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or ha so far departed from the accepted and usual court of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with

relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

APPENDIX F

U.S. SUPREME COURT RULES:

RULE 15. Briefs in Opposition; Reply Briefs; Supplemental Briefs

2. A brief in opposition should be stated briefly and in plain terms and may not exceed the page limitations specified in Rule 33. In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition. Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition.

APPENDIX G

U.S. SUPREME COURT RULES:

Rule 29. Filing and Service of Documents; Special Notifications; Corporate Listing.

(6) Every document, except a joint appendix or amicus curiae brief, filed by or on behalf of one or more corporations shall list all parent companies and nonwholly owned subsidiaries of each of the corporate filers. If there is no parent or subsidiary company to be listed, a notation to this effect shall be included in the document. If a list has been included in a document filed earlier in the case, reference may be made to the earlier document (except when the earlier list appeared in an application for an extension of time or for a stay), and only amendments to the list to make it current need be included in the document being filed.

APPENDIX H

U.S. SUPREME COURT RULES:

RULE 35. Death, Substitution, and Revivor; Public Officers

1. If a party dies after filing a petition for a writ of certiorari to this Court, or after filing a notice of appeal, the authorized representative of the deceased party may appear and, on motion, be substituted as a party. If the representative does not voluntarily become a party, any other party may suggest the death on the record and, on motion, seek an order requiring the representative to become a party within a designated time. If the representative then fails to become a party, the party so moving, if a respondent or appellee, is entitled to have the petition for a writ of certiorari or the appeal dismissed, and if a petitioner or appellant, is entitled to proceed as in any other case or nonappearance by a respondent or appellee. If the substitution of a representative of the deceased is not made within six months after the death of the party, the case shall abate.

2. Whenever a case cannot be revived in the court whose judgment is sought to be reviewed, because the deceased party's authorized representative is not subject to that court's jurisdiction, proceedings will be conducted as this Court may direct.

APPENDIX I

Federal Rule of Civil Procedure:

Rule 25. Substitution of Parties:

(a) Death.

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 4 for the service of a summons, and may be served in any judicial district. Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

APPENDIX J

Federal Rule of Civil Procedure:

Rule 56. Summary Judgment:

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. the adverse party prior to the day of hearing may serve opposing affidavits. the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions of file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is genuine issue as to the amount of damages.

STATE OF CALIFORNIA

CERTIFICATION OF VITAL RECORD

COUNTY OF SAN DIEGO

CERTIFICATE OF DEATH

STATE OF CALIFORNIA

STATE FILE NUMBER 396537007376

1. NAME OF DECEDENT—FIRST (GIVEN)		2. MIDDLE		3. LAST (FAMILY)			
LAWRENCE		YORK		TRUE			
4. DATE OF BIRTH MM/DD/CCYY	5. AGE YRS.	IF UNDER 1 YEAR: MONTHS	DAYS	IF UNDER 24 HOURS: HOURS	MINUTES	6. SEX	7. DATE OF DEATH MM/DD/CCYY	8. HOUR
02/02/1923	73					M	05/14/1996	1150
9. STATE OF BIRTH	10. SOCIAL SECURITY NO.	11. MILITARY SERVICE		12. MARITAL STATUS	13. EDUCATION—YEARS COMPLETED		
NY	104-12-1681	19 TO 19		MARRIED	20		
14. RACE	15. HISPANIC—SPECIFY			16. USUAL EMPLOYER			
CAUCASIAN	YES X NO			SECURITY PACIFIC NATIONAL BANK			
17. OCCUPATION	18. KIND OF BUSINESS/INDUSTRY			19. YEARS IN OCCUPATION			
TRUST OFFICER, VICE PRESIDENT	BANKING			27			
20. RESIDENCE—STREET AND NUMBER OR LOCATION							
5309 CANTERBURY DRIVE							
21. CITY	22. COUNTY	23. ZIP CODE	24. YRS IN COUNTY	25. STATE OR FOREIGN COUNTRY			
SAN DIEGO	SAN DIEGO	92116	35	CA			
26. NAME, RELATIONSHIP	27. MAILING ADDRESS (STREET AND NUMBER OR RURAL ROUTE NUMBER, CITY OR TOWN, STATE, ZIP)						
ROSE MARIE N. TRUE, WIFE	5309 CANTERBURY DRIVE, SAN DIEGO, CA 92116						
28. NAME OF SURVIVING SPOUSE—FIRST	28. MIDDLE	28. LAST (BIRTH NAME)					
ROSE MARIE	JOY	NELSON					
31. NAME OF FATHER	32. MIDDLE	33. LAST	34. BIRTH STATE				
RANSOM	BADGER	TRUE, III	NY				
35. NAME OF MOTHER—FIRST	36. MIDDLE	37. LAST (BIRTH NAME)	38. BIRTH STATE				
EMILY	-	BATTERSON	NY				
39. DATE MM/DD/CCYY	40. PLACE OF FINAL DISPOSITION						
05/16/1996	FORT ROSECRANS NATIONAL CEMETERY, CABRILLO MONUMENT DRIVE, SAN DIEGO, CA 92106						
41. TYPE OF DISPOSITION	42. SIGNATURE OF EMBALMER	42a. LICENSE NO.					
CR/BU	NOT EMBALMED	-					
44. NAME OF FUNERAL DIRECTOR	45. LICENSE NO.	46. SIGNATURE OF LOCAL REGISTRAR	47. DATE MM/DD/CCYY				
MERKLEY-MITCHELL MORTUARY	FD-119	OIC	05/15/1996 TLM				
101. PLACE OF DEATH	102. IF HOSPITAL, SPECIFY CODE	103. FACILITY (IF NOT HOSPITAL)	104. COUNTY				
SAN DIEGO HOSPICE ACUTE CARE CNTR	IP ER/OP DOA	OTHER	SAN DIEGO				
105. STREET ADDRESS—STREET AND NUMBER OR LOCATION			106. CITY				
4311 THIRD AVENUE			SAN DIEGO				
107. DEATH WAS CAUSED BY: ENTER ONLY ONE CAUSE PER LINE FOR A, B, C, AND D.			INTERVAL BETWEEN ONSET AND DEATH	108. DEATH REPORTED TO CORONER			
IMMEDIATE CAUSE (a) METASTATIC PROSTATE CANCER			14 YRS	YES X NO			
DUE TO (b)				109. AUTOPSY PERFORMED? X YES NO			
DUE TO (c)				110. AUTOPSY PERFORMED? YES X NO			
DUE TO (d)				111. USED IN DETERMINING CAUSE? YES NO			
112. OTHER SIGNIFICANT CONDITIONS CONTRIBUTING TO DEATH BUT NOT RELATED TO CAUSE GIVEN IN 107							
NONE							
113. WAS OPERATION PERFORMED FOR ANY CONDITIONS IN ITEM 107 OR 112? IF YES, LIST TYPE OF OPERATION AND DATE.							
ORCHIECTOMY, --/--/1989							
114. I CERTIFY THAT TO THE BEST OF MY KNOWLEDGE DEATH OCCURRED AT THE HOUR, DATE AND PLACE STATED FROM THE CAUSES STATED.	115. SIGNATURE AND TITLE OF CERTIFIER	116. LICENSE NO.	117. DATE SIGNED MM/DD/CCYY				
		C40088	05/15/1996				
PERSON ATTENDED DECEDENT MM/DD/CCYY	PERSON LAST SEEN ALIVE MM/DD/CCYY	118. TYPE ATTENDING PHYSICIAN'S NAME, MAILING ADDRESS, ZIP					
05/09/1996	05/14/1996	CHARLES LEWIS,M.D.; 4311 THIRD AVENUE, SAN DIEGO, CA 92103					
I CERTIFY THAT IN MY OPINION DEATH OCCURRED AT THE HOUR, DATE AND PLACE STATED FROM THE CAUSES STATED.	119. MANNER OF DEATH	120. INJURY AT WORK	121. INJURY DATE MM/DD/CCYY	122. HOUR	123. PLACE OF INJURY		
	NATURAL ACCIDENT SUICIDE HOMICIDE PENDING INVESTIGATION COULD NOT BE DETERMINED	YES NO					
	124. DESCRIBE HOW INJURY OCCURRED (ENTER WORDS "DURING WORK" IF INJURY)						
	125. LOCATION—STREET AND NUMBER OR LOCATION AND CITY AND ZIP CODE						
126. SIGNATURE OF CORONER OR DEPUTY CORONER	127. DATE MM/DD/CCYY	128. TYPED NAME, TITLE OF CORONER OR DEPUTY CORONER					
STATE REGISTRAR	A	B	C	D	E	F	G	H	FAX AUTH. # 9607378	CENSUS TRACT

A0063905

County of San Diego - Department of Health Services - 3851 Rosecrans Street. This is to certify that, if bearing the OFFICIAL SEAL OF THE STATE OF CALIFORNIA, the OFFICIAL SEAL OF SAN DIEGO COUNTY AND THEIR DEPARTMENT OF HEALTH SERVICES EMBOSSED SEAL, this is a true copy of the ORIGINAL DOCUMENT FILED. Required fee paid.

DATE ISSUED: August 28, 1997

ROBERT K. ROSS, M.D.
REGISTRAR OF VITAL RECORDS
County of San Diego

This copy not valid unless prepared on engraved border displaying seal and signature of Registrar.

ANY ALTERATION OR ERASURE VOIDS THIS CERTIFICATE

BEST AVAILABLE COPY